SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~526~~ 6

AL HARRIS, PETITIONER,

v.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 11, 1965

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[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

On Appeal From the United States District Court for the Southern District of New York.

Appellant's Appendix

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CRIMINAL DOCKET

63 CR 664

THE UNITED STATES,

—vs.—

AL HARRIS.

CRIMINAL CONTEMPT OF COURT BY REFUSING TO ANSWER QUESTIONS BEFORE GRAND JURY

DOCKET ENTRIES

DATE	PROCEEDINGS
8- 8-63	Hearing begun and concluded on 8-8-63 to compel the witness Al Harris to answer questions. The witness refuses to answer the questions after having been directed to do so by the Court. Gov't moves to punish witness for wilful refusal to answer the questions. Motion Granted. Witness Al Harris adjudged in contempt of Court. The Court directs that the witness be sentenced to One (1) Year. Bail pending appeal fixed in the sum of $10,000. Deft. remanded. McLean, J.
8- 9-63	Filed Order, Certificate & exhibit, dated 8-9-63, that pursuance of Rule 42(a) of the FRCP, the defendant Al Harris is found to be guilty of contempt of this Court, and is hereby committed to the custody of the Attorney General for imprisonment for a period of One (1) Year. McLean, J.

[fol. 2]

DATE	PROCEEDINGS
8- 9-63	Issued Certified copies of order of commitment to the U.S. Marshal.
8- 9-63	Filed Bail Bond for $10,000., dated 8-8-63 by Public Service Mutual Insurance Co. pending appeal to U.S.C.A.
8- 9-63	Filed Notice of Appeal to U.S.C.A.
8-16-63	Filed Remand, dated 8-8-63. McLean, J.—with Endorsement—"Released on bail this 8th day of August 1963" Sweeney, Dep. Clerk
10- 3-63	Filed Affidavit, Consents & Order extending the Deft's bail limits. Weinfeld, J.

[fol. 3]

Grand Jury Minutes

August 7, 1963

Re: Al Harris
Mr. Maloney

Grand Jury in Court Session before
Judge McLean, U.S.D.J.

APPEARANCES:

Andrew J. Maloney, Assistant United States Attorney.

Moses Polakof (at point indicated), Attorney for Mr. Al Harris.

Al Harris (at point indicated), Witness.

Mrs. Raimonde Kass (at point indicated), G. J. Reporter. Date: August 7, 1963.

G. J. Steno: M. T. Connolly

Mr. Maloney: Good morning, Your Honor. If Your Honor please, the Grand Jury this morning is here to seek your aid in a matter involving a violation of the Federal Communications Act. A witness by the name of Al Harris was sworn this morning and questioned and directed to answer certain questions to which he holds his privilege. Even though he was informed that the Grand Jury was granting him immunity under 409(1), he persisted in refusing to answer the questions. I would ask Your Honor now to permit the Grand Jury Stenographer to read the minutes to understand the issues before the court.

Judge McLean: This is the same matter we had last week.

[fol. 4] Mr. Maloney: That's correct, sir.

Judge McLean: As I understand it, I think that Mr. Harris should be present and his counsel should be present, and these questions read and these questions discussed. I take it the Grand Jury has no objection to revealing to Mr. Harris' counsel what these questions were. Is that right?

Foreman: No, I have no objection, Your Honor.

Judge McLean: I will direct his counsel, as I did last week. Very well, have him come in.

(Witness and his attorney, Mr. Polakof are brought into the court room.)

Mr. Maloney: If Your Honor, please, may the record reflect that Mr. Polakof is present along with Mr. Harris, and might I inquire of Mr. Polakof whether he appears here as the attorney for Mr. Harris.

Mr. Polakof: Your Honor, may I state my position to Your Honor. I don't know this witness. I never met him prior to my appearance before Your Honor last Thursday, —I met him Wednesday night—at that time I appeared. He was referred to me by an attorney, I assume. The attorney called me up and said, "Please appear with him and then arrange for your fee." I appeared with him and after my appearance before Your Honor on Thursday I

conferred with him in my office and told him my suggested fee. When I appeared before Your Honor last Thursday it was really for the purpose of obtaining an adjournment to determine whether or not I appear for him.

You realize it was very short notice. Your Honor was kind enough to explain the situation. I was here and it didn't involve too much argument on my part, and Your [fol. 5] Honor dismissed the proceedings, and now it is starting all over.

I met with the defendant and he is without funds. I'm a single practitioner. I have other engagements. In fact, at the time of Mr. Maloney's phone call when he requested my appearance, I cancelled a very important luncheon appointment. So, in the first place, I would like to be relieved of the position as counsel. The witness has informed me that if he had some time, a week or two, he thinks he can raise the money by borrowing it. As the result of my appearance here—as long as I'm here—I'll gladly do it without compensation but, as I study the situation, this is going to be—probably will involve contempt. It will involve appeals, not only to the Court of Appeals but, perhaps, the Supreme Court of the United States. I have spent considerable time studying the law but not enough to be in a position to argue it as fully as I would like to.

I have studied the *Marcus* case and the *Brown* case. It's my considered opinion that the immunity statute is being misapplied. I have read Section 203(c), the Communications Act, several times. How that could possibly involve —how this witness could possibly give any testimony that would involve the fixing of rate schedules and phone service is beyond my comprehension. I saw nothing in 203(c) that could possibly involve this witness.

In the *Brown* case it involved the Commerce Department. That was—the statute there, I believe, was passed, I believe, in 1934. It's the same statute you have in the Sherman Law and Interstate transportation. The *Brown* case clearly shows—on the question as I understand it—investigating trucking in interstate commerce; whether or not the trucker had obtained or applied for a license.

[fol. 6] Judge McLean: I think now we're coming into the merits.

Mr. Polakof: I just want, Your Honor, to know I spent some time. I do recall in the *Brown* case that the Court of Appeals consistently stated that the defendant was given considerable time to obtain an attorney and the advice of an attorney, and it's my suggestion, Your Honor, that this matter be determined so that he may retain counsel.

Mr. Maloney: Your Honor, I think the best way to hear from the government is to hear this transcript which I believe will solve many of the problems raised by counsel; and just one small argument I would just make in reply to counsel: whether or not counsel or the witness sees any remote possibility of his being involved into violations of 203(c) or 501 of Title 47 has no merit. This Grand Jury is asking assistance and he is not in any position to test the relevancy or the nature of the proceedings and where they may lead. Now, without further to-do, your Honor, may I now swear in the stenographer and read the transcript?

Judge McLean: Not just yet. You appreciate, Mr. Polakof, that I want to get on with this proceeding.

Mr. Polakof: I do, sir.

Judge McLean: I suggested to Mr. Harris last week that he get a lawyer. He was wise enough to get you. You came down here and had a discussion with us last week in which you say I would not go ahead on that record but that I anticipated that the United States attorney would start again, and that would give both you and me a further time to look into the cases; and I see you have done that, from what you have said, —that you have to some extent, —and I would like to have you stay in this, at least through this stage.

Mr. Polakof: Well, Your Honor, I'm here. If Your [fol. 7] Honor wants me to stay now for this particular proceeding, I will acquiesce to Your Honor's wishes.

Judge McLean: I appreciate that because you're an experienced lawyer and will give the witness the representation. I don't want to hold everything up while he tries to find another lawyer, so I appreciate it if at my request you continue to represent him at this point. What you do in the future, at some future point, isn't something you

immediately decide now. I hope there won't be any future point after we go over this this morning.

Now, on that understanding Mr. Polakof is going to represent Mr. Harris at present, at any rate, at the Court's request. You can go ahead and have the Grand Jury Stenographer read the questions asked Mr. Harris today and I'll ask Mr. Polakof, as I did the last time, to keep this confidential because this is a Grand Jury room, a Grand Jury proceeding. You're the only person who isn't connected with the Grand Jury who is here.

Mr. Polakof: I assure you I'll keep it confidential with one exception. It may be necessary for me to advise another lawyer what transpired.

Judge McLean: Another lawyer. Now, I suggested to you last time, Mr. Maloney, that you put in evidence or mark in some way the subpoena.

Mr. Maloney: It's already been done, Your Honor, as Your Honor will see from the transcript.

Judge McLean: May I see it now.

(Mr. Maloney hands Judge a paper.)

You might show this to Mr. Polakof.

Mr. Polakof: I've seen it.

Mr. Maloney: May the record reflect that the Court and [fol. 8] Mr. Polakof are referring to Grand Jury Exhibit 1 of this date.

Judge McLean: I assume so. I don't see any mark on it.

(Mr. Maloney points something out to the Judge.)

Judge McLean: Oh, yes.

Mr. Maloney: May the witness be sworn, Your Honor, the Stenographer, Your Honor.

Judge McLean: You're the Grand Jury Stenographer.

Mrs. Kass: Yes, Your Honor.

Mr. Maloney: Mr. Foreman, will you please swear in the witness.

(Witness Raimonde S. Kass is then duly sworn by the Foreman of the Grand Jury.)

Q. Will you please state and spell your name for the record?

A. My name is Raimonde S. Kass (spelled).

Q. By whom are you employed?

A. By the Department of Justice, Southern District of New York.

Q. In what capacity?

A. As a Grand Jury Reporter.

Q. And were you so employed this morning in the Grand Jury room when Mr. Harris appeared as a witness?

A. Yes, I was.

Mr. Maloney: Would you please mark this Grand Jury Exhibit #2, of this date. (So marked.)

Q. I show you what has been marked Grand Jury Exhibit 2 of this date and I ask you can you identify it?

A. Yes.

Q. What is it?

A. They're the minutes of the examination of Mr. Al Harris taken this morning.

Q. Now, with Your Honor's permission may the witness read Grand Jury Exhibit 2.

Judge McLean: Yes.

[fol. 9] Q. Would you speak up in a loud voice so that every member of the Grand Jury as well as the stenographer can hear you.

(Witness reads entire Exhibit 2.) See attached.

Mr. Maloney: That, Your Honor, I believe completes the testimony of this witness before this Grand Jury this morning.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Polakof: May I have one statement cleared up, Your Honor. I do not know Mr. Panzer. For the record, Mr. Panzer did not recommend this witness to me.

Judge McLean: Mr. Polakof said something a while ago about he didn't understand how Section 203 of Title 47 could possibly be involved. I understand there is a theory on that. Will you tell us, Mr. Maloney?

Mr. Polakof: Your Honor, I think we have to go by the record.

Judge McLean: I want to ask Mr. Maloney to explain this so you understand.

Mr. Maloney: Well, Your Honor, it is a violation to use interstate wire facilities to engage in wagering or to promote an unlawful activity such as gambling. Just exactly where and who will be involved in the current investigation before the Grand Jury, of course, the Grand Jury does not know. It does not have a crystal ball. But this witness as well as others who are not connected with any telephone company certainly could be named under Section 2 of Title 18, as aiders and abettors in the fixing of rates or in connection with this very violation of Section 203(c) and Section 501 of Title 47.

Judge McLean: That has nothing to do with the fixing of rates.

Mr. Maloney: No, Your Honor. It has, dealing with just [fol. 10] promoting unlawful activity on a wire communication which would be a violation.

Judge McLean: Is not the theory by which Section 203(c) is invoked in these cases that when a person uses the telephone for some illegal purpose such as gambling he is causing the telephone company to violate the schedule of rates and carriers and so forth which expressly say that the phone shall not be used for those purposes?

Mr. Maloney: That's correct, your Honor.

Judge McLean: And isn't that the theory on which the court proceeded in the Marcus case?

Mr. Maloney: That is exactly right, sir.

Judge McLean: Now, Mr. Polakof may not agree, but I think that's why this section appears.

Mr. Polakof: May I be heard, Your Honor?

Judge McLean: First we'll see if Mr. Maloney has anything more he wants to present.

Mr. Maloney: Might I say, Your Honor, I think, perhaps, we are getting off the real issues before Your Honor, and the real issues here are, number one, is this Grand Jury conducting a proceeding for violation of the Federal Communications Act, and on the record, it is; Number two, if so, has Your Honor the power to grant immunity? I call upon Your Honor—I direct Your Honor's attention to Section 409(1) which sets forth that the Grand Jury does have

such power and which the Grand Jury did do in the Marcus case, 310 F. (2d) 143.

Just how the witness fits into this full conspiracy, that is not an issue before this Court. What his complete part in it is, the Grand Jury wishes to find out. In return for this the Grand Jury is giving him the extraordinary privilege of immunity. Really, I don't understand just what he has to complain of. As any citizen has, he has a duty to [fol. 11] testify. Balanced against this, as I said before to Your Honor, is his privilege under the Fifth Amendment. Now, this Grand Jury has shifted that balance by granting him immunity in its proceeding. I cannot see in any way how he's prejudiced by directing him to answer these questions in order to assist the Grand Jury in its investigation of violations of the Federal Communications Act.

Judge McLean: Are you finished?

Mr. Maloney: Yes, Your Honor.

Mr. Polakof: In the first place, Your Honor, it's elementary. The designation of a section in a Grand Jury's subpoena or even in an indictment is not the controlling factor. Your Honor knows that after every indictment, in brackets there's a quotation of the Section and the law is well established that if it's a misquotation it doesn't invalidate the indictment. I submit most respectfully to Your Honor that neither Your Honor nor the Grand Jury has the power to grant immunity except where authorized by Congress. That's elementary. The fact that this subpoena refers to Section 203(c) is disproven by questions put to this witness. This is a violation of Section 1952 which makes it a crime to use telephones, travel or other means to promote gambling in interstate commerce. It is my considered opinion that several bills have been offered to Congress prior to the passage of 1952 in 1961 with an immunity section, and Congress has not seen fit to pass those bills, and I rely on recollection before Your Honor. This would involve a search of the Library of Congress because the U.S. Code includes only reference to the bills that were passed. Now, in 1962, Section 1954 was added to that Title and there Congress saw fit under certain safeguards—it also deals with [fol. 12] the racketeering part of the Code—to authorize

immunity under certain circumstances, I think, with the approval of the Attorney General.

Now, the *Marcus* case is distinguishable, Your Honor, very clearly distinguishable. In the *Marcus* case the witness had made a complaint to the Public Service Commission that he was denied telephone service. That's the complaint they were investigating clearly within the purview of the Communication Act.

The best proof that this is a violation of Section 1952 is the fact that the Assistant warned the witness that any answer that he may give,—that he may refuse to answer any question that would incriminate him. That is not necessary under 501 of the Communications Act, nor is it necessary under the Sherman Law or the Commerce Law. However, it is necessary under the immunity acts that have been passed since, the Securities and Exchange Act, the Narcotic Act and other acts. Assume, Your Honor, that the use of a telephone was made to set up a murder. Would the witness be given immunity because he used a telephone and then stated, yes, he knows who did it? This is a dangerous precedent. That's why Congress refused to give the prosecuting authorities or the Grand Jury the right to give immunity generally.

If what Your Honor says is true we don't need any further immunity sections because in any crime under Title 18—and I think there are two thousand sections of law—if a telephone is used to make a call, that would come under the Commerce clause, as the Assistant attempts to allege. That is not the fact and I think that this witness was entirely within his rights in refusing to answer any questions, particularly after he had been warned that he may do so.

[fol. 13] Judge McLean: It made a little fire under you when he asked a question about you.

Mr. Polakof: That's stupid, Your Honor; but these are not intelligent people. He was in my office this morning, Your Honor, and I offered him gratuitous advice—well, just as a creditor, or maybe I'm a softie—and I tried to guide him. That's why he needs an attorney outside and that's why the law gives him the right to tell the Grand

Jury he would like to go out to consult his attorney. That's silly, but that shows they get imbued with an idea and they follow it through with ridiculous questions, but that's happened before, Your Honor, and it's happened to smart people.

Judge McLean: Your point is, I take it, that inasmuch as gambling is involved and Section 1952 of Title 18 is involved that any immunity that this man could enjoy would have to be something given by that Section?

Mr. Polakof: No, Your Honor.

Judge McLean: Isn't that your point?

Mr. Polakof: No; that's part of it but I go further because 1952 does not offer it. I go further and I say this is not an investigation of the Communication Act in any form, shape or manner, and it's an abuse; it's a misapplication of law, and the mere fact that the subpoena gives one section doesn't make it so because the questions put to the witness are clearly one of gambling, and Your Honor's theory that if, if a phone was used to make a call and if the Telephone Company knew about it—and you're going far afield—that may have been a violation; or are you saying that if the Telephone Company gave these people the right to use the phone knowing—which is far fetched—that it may be used to make a gambling call, that would come under 47? I don't see that, respectfully, Your [fol. 14] Honor. I don't see anywheres in 47 any statement in the entire book that says that a phone call may not be made for gambling purposes.

Judge McLean: I have no theory. I was merely trying to elicit the government's theory. What I stated that I understood the government's theory to be is also what I understood the Court to be talking about in the *Marcus* case.

Mr. Polakof: If you will look at the *Marcus* case, if you have it, Your Honor, you will see that this witness made a complaint that he was denied telephones. Now, I think that the Telephone Company being a public service company must grant it to everyone who applies. Apparently the Telephone Company rejected it. Now, the inquiry was, was the rejection correct or did the Telephone Company abuse the section?

Judge McLean: Where did you find out this interesting information about the *Marcus* case. Is that in the record?

Mr. Polakof: Yes, sir.

Judge McLean: It's not in the opinion. Do you have the record.

Mr. Polakof: I think it's in the opinion. An associate—not an associate, but I had to use the services of a former assistant, a young man, to go to the library and do some research for me, but I think you will find in the record that he was informed that he was questioned did he make a complaint in 1955 to the Massachusetts Public Service Commission to the effect that he was denied the use of telephones.

Mr. Maloney: Your Honor, please.

Mr. Polakof: Am I correct?

Judge McLean: Just a minute, Mr. Maloney. The opinion, if that's what we're talking about—

[fol. 15] Mr. Polakof: Yes.

Judge McLean: —in the *Marcus* case that said—page 145 of 310 F. (2d)—that the witness was asked if he had been investigated by the Massachusetts Crime Commission and whether he had appealed to the Massachusetts Public Utilities Commission because the Telephone Company had refused to install twelve telephones in his office—is that what you have reference to?

Mr. Polakof: That's correct, Your Honor.

Judge McLean: I don't find anything else in the opinion that indicates the Grand Jury was investigating the telephone company.

Mr. Polakof: But the question indicates that at least there was a materiality that they could be inquiring. That's the question they put to him, "Did you make a complaint to the Public Service Commission?" Well, if he made a complaint that would come within the purview of 47, Title 47, it's apparent. In the *Brown* case the only questions asked had to do with interstate trucking. They never got to the other point.

Mr. Maloney: If Your Honor please, without trying to be facetious or too blunt, I believe counsel's distinction is

rather absurd to believe that in order to grant such immunity under Section 409(1) a proceeding would have to start just as it happened to start in *Marcus*, but I think *Marcus* at page 147 states very succinctly in the right hand column—I'll just read those two sentences: "Was the proceeding one involving the Communications Act? Obviously the Grand Jury under its general powers could investigate within a wide field dealing with violations of many statutes including the Communications Act."

Your Honor, that's all we're doing here this morning. The Grand Jury is investigating into violations of the Federal Communications Act. The Marcus case tells us—indeed, [fol. 16] the statutes tell us—once the proceeding is started, this Grand Jury has the power to grant immunity. That's the only issue before the court, and going into whether or not this might lead into an indictment of the 1952 or not, counsel is without standing.

In Levine of this Circuit which was a contempt proceeding in which the same issue was raised, the Court of Appeals held that counsel was without any standing to inquire into the purpose or nature of the proceeding when directed to answer questions. Your Honor, I believe the issues are simple. The Marcus case is on all fours, and I would ask Your Honor to aid this Grand Jury in directing the witness to answer the questions that were put to him.

Mr. Polakof: I just want to repeat one thing, Your Honor. The Grand Jury cannot usurp the functions of Congress. If that's so, we need—you need no immunity statute.

Judge McLean: Well, as I said last week, I want to be sure that if I direct this witness to answer he will receive the immunity which I'm confident the Grand Jury intends in good faith to confer upon him; and the only question is whether or not this statute, 47 U.S.C., Section 409(1) does confer the immunity under these circumstances; and we do have these two cases, Marcus and Brown, which discuss that subject at great length. We do not have any other cases, I take it, Mr. Polakof.

Mr. Polakof: Your Honor, as I said to you, I've not done thorough research. I believe this requires thorough research and I believe this is a very important question, and

that's why I stepped out of the case. I've done my duty this morning at Your Honor's request. From here on I believe Mr. Harris is entitled to counsel.

[fol. 17] Judge McLean: Well, I do want to know a little more about the record of the Marcus case. You don't actually have the record?

Mr. Maloney: No, I do not, Your Honor.

Judge McLean: I suppose we could get that.

Mr. Maloney: It's not in this Circuit, Your Honor. I presume it might be in the library. It might not be here, though.

Judge McLean: The question has been raised as to whether or not the Marcus case which is—after all, seems directly in point here—was involved in some investigation of the Telephone Company. Now, the way to find out is to look at the record.

Mr. Maloney: If Your Honor please, assuming *arguendo* it started that way, would this mean that all Grand Jury investigations would have to start similarly in order to grant immunity? I do not believe the position of counsel is at all sound here, even if we assume everything about the initiation of this thing.

Mr. Polakof: May I state, Your Honor, that if I was to continue on this case I would so advise Mr. Harris to tell his subsequent lawyer that I would require a hearing; I would require that this point be raised head on. Now, it's apparent to Your Honor as it must be to everyone in this room that a violation of the Telephone or the Communications Act is misapplied. Now, if they have that right, I think the Supreme Court would have to say something. I do not think they have that right, and my training as a lawyer in this court for forty-two years tells me it has not been given because I've been in cases where I know, where U. S. Attorneys have offered witnesses immunity and they couldn't give it, and the Court wouldn't direct it. They didn't have that power. What you're doing [fol. 18] here is substituting the power of this court or of the Grand Jury for the legislative power of Congress, and we know the Supreme Court has said many times that Congress makes the laws.

Judge McLean: Well, Congress made a law in the form of this Section that I just cited a minute ago. The ques-

tion is what does it mean in '34, and what was the purpose of the other immunity sections, and what was the purpose of the Attorney General and various Congressmen introducing bill after bill for immunity in certain crimes which were denied. Now, it's almost 1:30. I expect the Grand Jury would like to have a little lunch, and I would like to have some myself. I think the purpose to be served that I had in mind last week is that Mr. Polakof has obviously thought about it and I'm not going to act today without further thought on the matter. Now, I would direct that the witness come back here tomorrow in the morning and I'll ask Mr. Polakof to come back with him and stay in that long at my request.

Mr. Polakof: Oh, Your Honor.

Judge McLean: And I'll announce my decision then. We'll go on from there. Now, what time does the Grand Jury meet—11 o'clock?

Mr. Maloney: 10 o'clock, Your Honor.

Judge McLean: Well, we meet here at 10 o'clock. That will be time enough.

Mr. Polakof: Your Honor, may it be specifically understood—of course, if you want to decide in the witness' favor—but if you don't, and there's a contempt proceeding, I do not wish to remain in the case under the circumstances.

Judge McLean: Well, I won't cross that bridge yet. If there's a contempt proceeding it may not be a prolonged one.

[fol. 19] Mr. Polakof: Well, I mean it's a question of appeal and a question of bail. There's a lot of questions.

Judge McLean: I certainly am not asking you to stay in for any appeal.

Mr. Polakof: I got myself unnecessarily involved.

Judge McLean: 10 o'clock tomorrow morning at which time I'll let you know. Now, if you can get me that record, I'd like to have it. If you can't get it, you can't get it.

Mr. Maloney: All right, Your Honor.

[fol. 20]

TRANSCRIPT OF GRAND JURY EXHIBIT 2

August 7, 1963.

Re: AL HARRIS, et al.
MR. MALONEY.

Witness: AL HARRIS

AL HARRIS, having been duly sworn by the Foreman, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please? A. Al Harris (spells).

Q. Mr. Harris, before proceeding any further, may I see the subpoena by which you appeared here this morning?

Mr. Maloney: Would you mark this Grand Jury Exhibit #1, please? (So marked.) May the record reflect that Grand Jury Exhibit #1 is a subpoena which Mr. Harris gave to me, which sets forth that Mr. Harris will be here this morning to testify and give testimony in regard to alleged violations of Sections #501 and #203-C of Title #47, United States Code.

Q. Now, Mr. Harris, before proceeding any further, let me advise you that you have a constitutional right not to answer any of my questions if you feel the answer might incriminate you in any way; do you understand that, sir? A. I do.

[fol. 21] Q. Now, Mr. Harris, do you know of a phone call made by John Manarite, around January or early February of this year, from Miami, Florida to Flushing, New York, in connection with the leasing of a premises in Ojus, Florida, for the purposes of a dice game? A. I refuse to answer on the ground it would tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that last question?

Foreman: Would you please answer the question?

Witness: I refuse to answer on the grounds it would tend to incriminate me.

Q. Now, let me advise you, Mr. Harris, that this Grand Jury is inquiring into alleged violations of the Federal Communications Act, namely Sections #501 and #203-C, in that there are allegations that a phone call was made to lease a premises for gambling purposes, and as such, this phone call was therefore being used as an interstate wire facility, by which a gambling enterprise would be promoted or furthered. Do you understand that, sir? A. I do.

Q. Do you also understand that, in proceedings inquiring into federal communications violations, the Grand Jury, after you invoke your privilege against self-incrimination, may direct you to answer questions, and by so doing, grant you immunity under Title #47, United States Code, Section 409-L? In other words, on any answers to my questions that you're directed to answer, you're given immunity from prosecution. Do you understand that, sir?

Foreman: It cannot be used against you.

Q. Do you understand the question? A. I do.

[fol. 22] Q. Now, once again, Mr. Harris, let me ask you: do you know of a phone call made by one, John Manarite, in January or February of this year, from Florida to Flushing, New York, in connection with the leasing of a premises for the purpose of establishing a dice game in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct the witness again?

Foreman: I again put the question: do you understand this question cannot incriminate you? Do you still refuse to answer?

Witness: I refuse to answer.

Q. Now, Mr. Harris, do you know whether or not Mr. Manarite used a pay telephone? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that question?

Foreman: Again I direct you to answer the question, and do you still refuse to answer?

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman—

Foreman: I again direct you to answer.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's [fol. 23] premises was used by Mr. Manarite for that telephone call? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: I again direct the question to you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know whom Mr. Manarite was working for, or in partnership with, in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone, from Florida to Flushing, New York? A. I refuse to answer on the grounds it might tend to incriminate me.

Foreman: I again direct the question to you.

Witness: I refuse to answer on the grounds it will tend to incriminate me.

Q. Mr. Harris, do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman—

Foreman: It is again my duty to direct the question again to you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know whether or not, at the time of the making of this phone call, Mr. Manarite was in the employ, or in partnership with Mr. Thomas Lucchese? A. [fol. 24] I refuse to answer on the grounds it may tend to incriminate me.

Foreman: And again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, I ask you: do you know any of the person or persons who were the employers or partners of Mr. Manarite, at the time of the telephone call in question? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: Again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, in connection with this phone call, were you a partner in the operations of the dice game at the premises in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: And again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Now, Mr. Harris, do you have an attorney here this morning? A. No, sir.
Q. Who is your attorney? A. I don't have any.
Q. Do you recall being here on August 7th? Excuse me—August 1st of last week? A. Yes.
Q. Were you here at that time with an attorney? A. Yes.
Q. What was his name? A. Moses Kove.
Q. And were you here the day before that, on July 31st? A. Yes.
[fol. 25] Q. And were you here a week before that, on July 24th? A. Yes.

Q. Now, on July 24th, did you appear here with an attorney? the first appearance you made? A. No.

Q. Do you know Mr. Henry Panzer? A. I know of him.

Q. Was he there that morning? On July 24th? A. Yes.

Q. Was he giving you advice that morning? A. No, sir.

Q. Did he direct you away from conversing with Agent Pat Collins of the FBI that morning, outside the Grand Jury room? A. I don't recall.

Q. You don't recall? A. No.

Q. Could it have happened, sir? A. I don't know, sir.

Q. Why isn't Mr. Polakoff here this morning? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: Do you want me to direct that question?

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. It will incriminate you as to why Mr. Polakoff is not here this morning? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct this witness to wait outside the Grand Jury room until he's told to enter it once again?

Foreman: Yes; you'll go out for a few minutes?

(Witness leaves room and is recalled.)

Foreman: You have already been sworn.

Q. Mr. Harris, I remind you you're still under oath. A. Yes.

[fol. 26] Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that last question?

Foreman: I so direct you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. You may step outside, sir.

Mr. Maloney: Mr. Foreman, would you direct this witness to appear in Room #1505, immediately, upstairs?

Foreman: I so direct you; #1505, upstairs, right away.

(Witness leaves room.)

[fol. 27] August 8, 1963

Re: Al Harris

Mr. Maloney,
Assistant U. S. Attorney

Grand Jury in Court Session before
Judge McLean, U.S.D.J.

APPEARANCES:

ANDREW J. MALONEY,
Assistant United States Attorney

MOSES POLAKOF,
Attorney for Mr. Al Harris

AL HARRIS,
Witness

G. J. Steno: M. T. Connolly
Date: August 8, 1963

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Polakof: Your Honor, I was distressed to learn after we concluded our session yesterday that the Court reporter had not been present. I assumed that the lady who's sitting where she is now in the reporter's seat was a court reporter. After the session I asked her for a copy of the minutes. She told me she's a Grand Jury Stenographer and couldn't help me out.

I believe any proceedings before Your Honor requires a record for yourself and for me. Now, I do not know whether

the Grand Jury Stenographer reported everything that took place yesterday. If she did, I would like Your Honor to direct her to furnish me with a copy of the minutes. I'll be glad to pay for same.

[fol. 28] Judge McLean: Yesterday and still this morning we were in a Grand Jury proceeding; hence, the reporter was a Grand Jury reporter and we still have a Grand Jury reporter here today, and I certainly assume that she took down everything that was said. Did you, Miss Reporter?

Reporter: Yes, Your Honor.

Judge McLean: Now, I will not direct at this point that the minutes of the Grand Jury proceeding be made available to you. We haven't reached that point yet, and I hope that we won't. But if there should come a time when some contempt proceedings are instituted here and there could come a time when the witness wishes to take an appeal from any direction that may be entered into, at that point I think counsel is entitled to the minutes.

Mr. Polakof: May I call Your Honor's attention to the fact that last week when we had a hearing, also with the Grand Jury present, and with the public excluded, the Court Reporter was present and I did obtain a copy of the minutes.

Judge McLean: We didn't have any Grand Jury present last week. I did exclude people from the court room because there was going to be some discussion of what had occurred before the Grand Jury. I am sure that your clients are protected.

Mr. Maloney: If Your Honor, please, unless Your Honor wishes to hear further argument from the government, the Grand Jury would again seek your aid and assistance in directing the witness to answer the questions as put to him in the Grand Jury room.

Judge McLean: I was advised that the actual complete record in the Marcus case which we mentioned yesterday could not be supplied to me before today because it's in Philadelphia and would take a week or more to get it up [fol. 29] here, and I do not think it's necessary to delay these proceedings to await the arrival of that record. I have again since yesterday carefully reviewed the cases

which seem to be in point and also the Levine case which was mentioned by Mr. Maloney yesterday—United States against Levine, 267 F. (2d) 335, a decision of the Court of Appeals of this Circuit in 1959—and the situation seems to me to be this Grand Jury has represented to the Court that it is investigating possible violations of Title 47, Communications Act.

I must assume and I do assume that representation is made in good faith. The subpoena to this witness directs him to appear and testify with respect to possible violations of the Communications Act. The Court of Appeals in the Levine case has held that it is not the province of the witness to question whether or not the Grand Jury is actually investigating the matter that it says it is investigating. It is perfectly clear to me under title 47, Section 409(f) that in an investigation of possible violations of the Communications Act, the witness has no constitutional privilege to refuse to testify because he gets complete immunity against prosecution for anything that he may say in answer to questions which he is directed to answer in such a proceeding.

I therefore direct the witness to answer the questions.

Now, Mr. Polakof and I will retire from the Grand Jury room and you can proceed to ask the witness the questions.

Mr. Maloney: Your Honor, I believe you inadvertently referred to 409(f). I think it is 409(l)—just for the record's sake.

Judge McLean: It looks to my old eyes like an "f". It follows after "k", so it must be "l".

Mr. Maloney: Thank you, Your Honor.

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[fol. 30]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Transcript of Testimony

Before: Hon. Edward C. McLean, District Judge.

New York, August 8, 1963;
10 o'clock a.m.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the government; By Andrew J. Maloney, Esq., Assistant United States Attorney.

Moses Polakoff, Esq., Appearing for Al Harris.

Mr. Maloney: If your Honor please—

Mr. Polakoff: May it please your Honor, just so the record may be straight, my silence to your rulings did not indicate, your Honor, that I was acquiescing in them. I was just respectfully remaining silent.

Mr. Maloney: If your Honor please, the grand jury is back here once again to seek your aid and assistance in connection with an investigation before it involving the [fol. 31] Federal Communications Act and the witness, Mr. Harris.

I have the stenographer who took the minutes after your Honor had directed his answers, and with your Honor's permission I will swear in the stenographer and read that record.

The Court: Very well.

MARGARET T. CONNOLLY, called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maloney:

Q. Miss Connolly, by whom are you employed?
A. United States Department of Justice.
Q. In what capacity?
A. Grand jury reporter, Southern District of New York.
Q. And were you so employed this morning when Mr. Al Harris testified before the grand jury?
A. Yes, sir.

Mr. Maloney: Will you mark this as Government's Exhibit Number 1 for identification.

(Marked Government's Exhibit 1 for identification.)

Q. Miss Connolly, I show you what has been marked Government's Exhibit 1 for identification. I ask you, can you identify it?
A. Yes, sir.
Q. What is it?
A. These are grand jury notes which I took of the grand jury hearing of Al Harris this morning.

[fol. 32] Mr. Maloney: Now, with your Honor's permission, may the witness read those minutes?
The Court: Yes.
The Witness: (Reading):

"Mr. Harris was resworn by the Foreman of the grand jury.
"Mr. Maloney: (Q.) Mr. Harris, do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida, to Flushing, New York, in connection with the leasing of the premises in Ojus, Florida, for the purposes of a dice game?
A. I respectfully refuse to answer on the ground that it may tend to incriminate me.

"Mr. Maloney: Mr. Foreman, will you direct him to answer that last question?
"The Foreman: I so direct you.

"The Witness: I respectfully refuse to answer on the ground that it may tend to incriminate me."

Q. Do you know whether or not Mr. Manarite used a pay telephone?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: I direct you to answer.

"The Witness: I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"Q. Do you know whether or not he used a private premises to make that telephone call?

A. I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"The Foreman: Again I direct you to answer.

[fol. 33] "The Witness: I respectfully refuse to answer on the grounds it may tend to incriminate me.

"Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

A. I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the grounds it may tend to incriminate me.

"Q. Do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises—

"Q. Excuse me—that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

A. I—"

The Court: That last was part of a question?

The Witness: He interrupted in the middle of a question. Would you like me to read it without interruption, to be clear?

The Court: Yes, read it again.

The Witness: (Reading):

"Q. Mr. Harris, do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: Again I direct you to answer.

[fol. 34] "The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one, Carmine Tramunti?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Mr. Harris, I ask you do you know any of the person or persons or were the employers or partners of Mr. Manarite at the time of the telephone call in question?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. In connection with this phone call were you partner in the operation of the dice game at the premises in Ojus, Florida?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

[fol. 35] "Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

A. I respectfully refuse to answer on the ground that it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Mr. Maloney: Now, Mr. Foreman, would you direct this witness to wait outside.

"The Foreman: Will you please wait outside.

"(Witness leaves room.)"

Mr. Maloney: If your Honor please, that concludes the testimony of this witness this morning.

As your Honor has noted from previous argument at some length yesterday before your Honor at which Mr. Polakoff, the attorney for Mr. Harris, argued at length about why immunity would not attach, let me just state very briefly for the record that this grand jury has served a subpoena on Mr. Harris in connection with an investigation involving Title 47 of the United States Code, Section 501, which says in part that any person who wilfully and knowingly causes or suffers to be done any act, matter or thing prohibited or declared to be unlawful in the Communications Act, commits an offense punishable by fine and punishment.

In turn, in Section 203(c) of Title 47, it says no carrier shall provide communication service except as specified in its tariff.

[fol. 36] It is the government's position that this phone call in question was an unlawful phone call, in that it was attempting by the use of a wire facility in interstate commerce to promote and carry on a gambling operation which was to be conducted in Ojus, Florida, and, therefore, under the "causes and suffers" clause of Section 501 of Title 47, the use of that wire facility as well as any of his aiders or

abettors could be guilty of a violation of the Communications Act; and in connection with this investigation this grand jury, as your Honor has heard at length, is prepared to offer the witness immunity from prosecution for any testimony elicited from him in response to its questions, under Section 409-L of Title 47.

I therefore ask your Honor to direct this witness once again to answer the questions that were put to him.

Mr. Polakoff: Your Honor, I am not going to repeat the argument of yesterday, with one exception.

The grand jury has no authority to offer anyone immunity. That is solely by statute.

The Court: I will again direct the same questions to the witness:

Mr. Harris,—

Mr. Maloney: Excuse me, your Honor. I believe, perhaps, just for the record he should take the witness stand and be resworn in case he might answer any of your Honor's questions.

The Court: Very well.

[fol. 37] Al Harris, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. Do you know of a phone call made by John Manarite around January or early February of this year from Miami Florida to Flushing, New York in connection with the leasing of a premises in Ojus, Florida for the purpose of a dice game?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not Mr. Manarite used a pay telephone?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call?

The Court: I direct you to answer that question.
The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

The Court: I direct you to answer that question.
[fol. 38] The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whom Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

The Court: I direct you to answer that question.
The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Mr. Harris, I ask you, do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

[fol. 39] Q. In connection with this phone call, were you a partner in the operation of the dice game at the premises in Ojus, Florida?

The Court: I direct you to answer that.

The Witness: I respectfully refuse to answer on the grounds that it would tend to incriminate me.

Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

The Court: Does anybody want to say anything further?

Mr. Maloney: Your Honor, I think just for the record if your Honor would remind the witness that his responses to those questions—in response to these questions he is being granted immunity under 409-L.

The Court: I have already made my position perfectly clear, but I will say it again:

I have directed you to answer these questions before the grand jury, and I have directed you to answer them here. It is my ruling that you cannot be prosecuted for any answer that you give under the circumstances of this case.

Do you still refuse, Mr. Harris?

The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

[fol. 40]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Anything further?

Mr. Maloney: No, your Honor.

I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.

Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

[fol. 41] Mr. Polakoff: Or a hearing on contempt open to the public?

The Court: This is open to the public.

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

He is remanded to the custody of the marshal.

Mr. Polakoff: Will your Honor fix bail pending appeal?

The Court: Now I will entertain an application for bail. Do you intend to serve a notice of appeal?

Mr. Polakoff: Yes, your Honor. I told him I would, but I don't know whether I will personally continue with the appeal—

The Court: I am sorry to inconvenience you, Mr. Polakoff,—

Mr. Polakoff: (Continuing)—not until he pays me.

The Court: (Continuing)—but you have got to stay in here to protect this defendant until we get this part of it over with even though it does mean some personal inconvenience to you, and I appreciate your willingness to do it, [fol. 42] and I have to insist that you do, as I am sure you intend to anyway.

Now, I suppose that some formal order of commitment has to be signed, and then a notice of appeal has to be filed before an application for bail can be made; isn't that so?

Mr. Maloney: No, your Honor; an application for bail can be entertained by your Honor at this point.

Mr. Polakoff: At this point.

The Court: Does everybody agree on that?

Mr. Polakoff: I have ten days, haven't I, to file an appeal? Maybe some other lawyer will do it, but I am protecting him now.

The Court: You now apply for bail pending appeal?

Mr. Polakoff: Yes.

The Court: And you assure me you are going to take an appeal?

Mr. Polakoff: Yes, your Honor, I can assure you that an appeal will be taken, either by me or someone else.

The Court: And promptly.

Mr. Polakoff: Well, I must file—

The Court: You will take care of it and the notice of appeal filed?

Mr. Polakoff: It must be filed promptly, otherwise he waives it. It must be filed within ten days.

The Court: I don't want Mr. Harris to look around for a lawyer to file a notice of appeal for him.

Mr. Polakoff: I will file it for him.

The Court: You will file it for him if he is going to take it; is that understood?

[fol. 43] Mr. Polakoff: Yes, your Honor.

The Court: Now what do you say about bail?

Mr. Maloney: On the question of bail, your Honor, we are faced with a defendant who is facing one year incarceration. That alone should be a good reason for setting a substantial amount of bail.

And, in addition, Mr. Harris, who was living in the Concord Hotel at that time when interviewed by federal agents refused to divulge his permanent residence, which is an indication, I believe, your Honor that he certainly would be a bad risk for bail. His legal residence that he has claimed in the past is Miami, and he is presently residing at the Park Sheraton in New York City.

He is fifty-two years of age, and he has no known—to the government—no known legal occupation. He has two prior gambling misdemeanor convictions in Miami. These were disposed of by fines. It is the government's information that he is currently trying to get into the Grand Bahamas to work as a gambler, which is, of course, outside the jurisdiction of the United States. He is registered in Las Vegas as a gambler. He is divorced. He has two adult sons who are both gainfully employed and therefore not dependent upon this defendant for support.

In the light of all this, your Honor, and, of course, bearing in mind that he is facing or has been sentenced to one year imprisonment, and bearing in mind that in my view, the government's view, I see no real issues for appeal, the government asks that bond be fixed in the amount of $25,000.

Mr. Polakoff: Your Honor, that is—

[fol. 44] The Court: Just a minute. In my opinion the issues raised here are not frivolous, and I certainly will admit him to bail, and the only question is as to amount.

What do you suggest?

Mr. Polakoff: Oh, your Honor, this man won't run away. It is a gambling charge. If we are wrong in our opinion perhaps he will change his views and answer the questions. He is available to subpoena. When your Honor asked me would I accept the subpoena in court for him, we did? He could have walked out of the courtroom. The proceedings would have been over. The government would have had to look for him.

We have been here every time we have been directed to be here. There is no sense making bondsmen rich. I am on a committee of the Bar Association and we are trying to do away with bond; we are trying to do away with bondsmen. If he ran away he is guilty of an offense which carries five years. Is he going to add this to this?

I suggest a nominal bail of $1,000 would keep him here, your Honor.

Mr. Maloney: Your Honor, I will remind the Court under the Federal Rules of Criminal Procedure, all of a witness' or a defendant's roots in the community are one of the primary concerns, as noted in Stack v. Boyle. This particular defendant, to the government's information, and as far as this record is concerned, by his own counsel has not shown that he has any substantial roots in the community to keep him here.

[fol. 45] Mr. Polakoff: Well, your Honor, where are they going to run? Who is going to give up his American citizenship for a gambling charge or a charge for a violation of the Communications Act?

The Court: It is a question of judgment. I think you are both extreme. I will fix bail in the amount of $10,000. He will have to remain in custody until he posts it.

Now, if Mr. Harris should decide that he will answer the questions and testify, if he makes a motion within sixty days, I believe it is—

Mr. Polakoff: That is right, your Honor.

The Court: (Continuing) —for a reduction of sentence after having testified, I will be glad to consider a reduction of sentence.

I think this disposes of all the issues here?

Mr. Maloney: Thank you, your Honor.

Mr. Polakoff: Well, your Honor, may I have a copy now of these minutes and the minutes of yesterday?

The Court: Yes.

Now, as far as the grand jury minutes are concerned, those are, of course, solely for the use of yourself and your client or your successor attorney, if there is one.

Mr. Polakoff: Of course, your Honor, I do not want to be facetious, but my presence in the grand jury room vitiates

the secrecy. I am going to keep it only at your Honor's direction, because your Honor has suggested it. But the mere fact that I was present—I am an unauthorized person, and any act that the grand jury took in my presence could be nullified.

[fol. 46] But for the appeal it is important to have the minutes of yesterday and the minutes of today.

The Court: I directed that you be present because I thought it would be fair to you and fair to Mr. Harris to have you there.

Mr. Polakoff: That is right. That is why I am going to observe the secrecy, your Honor. And I will get the minutes?

The Court: Yes.

[fol. 47]

In United States District Court

Southern District of New York

Present: The Honorable Edward C. McLean, United States District Judge.

Criminal No. 63 CR 664

Criminal Contempt of Court by Refusing to Answer Questions Before Grand Jury

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The United States,

—vs.—

Al Harris.

Remand—August 8, 1963

8-8-63 The Court adjudges that the defendant is in Contempt of Court and Sentences him to One (1) Year at a place of confinement to be designated by the Attorney General of the U. S.

On the motion of the United States Attorney, Bail pending appeal fixed in the sum of $10,000.

[fol. 48] Ordered that the prisoner be remanded to the custody of the United States Marshal in lieu of Bail.

An extract of the Minutes.

James E. Valeche, Clerk, By Bernard Toomin, Deputy Clerk.

Endorsement On Remand

Released on bail this 8th day of August 1963.

David Sweeney, Deputy Clerk.

[fol. 49]

In United States District Court

Southern District of New York

Contempt Order—August 9, 1963

Al Harris, having committed, in the presence and the hearing of this Court, certain acts which are set forth in detail in the Certificate attached to this order, it is

Ordered, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant Al Harris hereby is found to be in contempt of this Court, and is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of one year. Bail in the amount of $10,000.00 was fixed on August 8, 1963, pending appeal.

Dated: New York, New York, August 9, 1963.

Edward C. McLean, U. S. D. J.

[fol. 50]

ATTACHMENT TO CONTEMPT ORDER—CERTIFICATE OF EDWARD C. MCLEAN, *U.S.D.J.*

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the defendant Al Harris, in the presence and the hearing of the Court, on August 8, 1963, committed the acts set forth in Exhibit No. 1 attached to this certificate, and that these acts constitute a contempt of the Court.

I further certify that on August 7, 1963, the defendant Al Harris was brought before me and in the presence of the United States Grand Jury for the Southern District of New York and the attorney for the defendant Moses Polakoff, Esq., the questions set forth in Exhibit No. 1 were read and counsel for the defendant was heard on the question of why the defendant should not be directed by the Court to answer the questions as put to him.

On August 8, 1963, in the presence of the defendant Al Harris and his attorney and in the presence of the United States Grand Jury for the Southern District of New York, I found that immunity as provided by Section 409(l) of Title 47, United States Code, was applicable and that the defendant no longer had a right to invoke his privilege against self-incrimination, and I directed the defendant to answer the same questions as set forth in Exhibit No. 1. Thereafter, the Grand Jury returned and in open court, in the presence of the defendant and his attorney, I was once again informed of the defendant's refusal to answer the [fol. 51] questions as set forth in Exhibit No. 1. I again directed him to answer the same questions which he had refused to answer the same questions which he had refused to answer in the Grand Jury proceedings, and once again in my presence he refused to answer the same questions. Defendant failed to state any valid reason why he should not be held in contempt of this Court.

Accordingly, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Al Harris in contempt of this Court and committed him to the custody

of the Attorney General, or his authorized representative, for imprisonment for a period of one year.

Dated: New York, New York, Aug. 9, 1963.

EDWARD C. MCLEAN, *U. S. D. J.*

[fol. 52]

EXHIBIT 1 ANNEXED TO CERTIFICATE OF EDWARD C. MCLEAN, U.S.D.J.

AL HARRIS, recalled before the Grand Jury, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

Mr. Maloney: Mr. Foreman, will you reswear the witness.

Foreman: Would you stand, please, and raise your right hand. Do you solemnly swear in the proceedings now pending before this Grand Jury that you will tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

By Mr. Maloney:

Q. Mr. Harris, do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida, to Flushing, New York, in connection with the leasing of a premises in Ojus, Florida, for the purposes of a dice game? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, will you direct him to answer that last question.

Foreman: I so direct you.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not Mr. Manarite used a pay telephone? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

[fol. 53] Foreman: I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises— A. I respectfully—

Q. Excuse me—that he talked about in his telephone conversation with a person or persons he talked to on the telephone from Florida to Flushing, New York? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

[fol. 54] Do you know whether or not Mr. Manarite was at the time of the making of this phone call in the employ or in partnership with one Carmine Trumanti? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ or in

partners with Mr. Thomas Luchese? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, I ask you do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. In connection with this phone call were you a partner in the operation of a dice game at the premises in Ojus, Florida? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

[fol. 55] Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, did you at any time in January or February of this year make an interstate telephone call in connection with a dice game that occurred in Ojus, Florida? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Now, Mr. Foreman, would you direct this witness to wait outside.

Foreman: Would you please wait outside.

Witness leaves room.

[fol. 56]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Cr 664

[Title omitted]

NOTICE OF APPEAL

Name and address of appellant Al Harris, Concord Hotel, Kiamesha, N. Y.

Name and address of appellant's attorney Moses Polakoff, 475 Fifth Ave., N. Y. City

Offense Contempt of Court

Judgment August 8, 1963 Sentenced to one year

Name of institution where now confined Custody of U. S. Marshal.

The above appellant hereby appeals to the Court of Appeals Second Circuit, from the above stated Judgment.

Moses Polakoff, 475 5th Ave., New York 17, N. Y., LE 2-6600.

[fol. 57]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Transcript of Hearing of August 1, 1963

Before: Hon. Edward C. McLean, District Judge.

New York, August 1, 1963
12:15 o'clock p.m.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney for the Government, By Andrew Maloney, Esq., Assistant United States Attorney.

Moses Polakoff, Esq., Attorney for Mr. Harris.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Maloney: If your Honor pleases, I think for the record it perhaps best that Mr. Polakoff stipulate that we have no objection to the proceeding being followed here as far as the grand jury not being present and the fact that his client is not in the room.

Mr. Polakoff: He will be in in a second. He just—

[fol. 58] Mr. Maloney: And the fact that we are going to concern ourselves with certain testimony concerning his client before secret proceedings of the grand jury, discussions which follow will necessarily cover some of those areas.

Mr. Polakoff: If your Honor please, Mr. Harris, who is now present, consulted me about 4:30 yesterday afternoon. At about ten minutes to five I spoke to Mr. Maloney.

I have not been able to acquaint myself with the facts in the case and what the proceedings are about, and under the circumstances I think I should be informed what they are about and be granted an adjournment because if we are going to have a formal hearing, which I believe these proceedings are, I want the right to call witnesses, if necessary, to present proof, if necessary, to protect the defendant's interest.

Mr. Maloney: Your Honor, may I be heard just briefly?

The Court: Yes.

Mr. Maloney: I am prepared to inform Mr. Polakoff what the proceedings are about. Right now I want to assure him that because of my revealing what it is about we are not revealing certain matters concerning his client before the grand jury and, secondly, let me say that it is my understanding that this is not really a hearing in that sense, that your Honor has saw fit to hear counsel on the issue of immunity in this case, upon your Honor's own discretion; that actually this matter is still before the grand jury and that I in no event see any reason for the calling of other witnesses, et cetera, as counsel has asked.

The Court: Well, Mr. Polakoff's mystification is understandable. He just heard about this just recently.

Mr. Maloney: Sure.

[fol. 59] The Court: But this is not a hearing in the sense of calling a witness, Mr. Polakoff. I was advised yesterday by the Assistant United States Attorney that your client, Mr. Harris, had declined to answer certain questions propounded to him before the grand jury, and I went up to the grand room and these questions were read to me. It was perfectly apparent from the transcript of the proceedings that Mr. Harris said several times that he wished to consult an attorney about this matter. I said that I thought he was entitled to consult with an attorney and that I would be glad to hear what he and his attorney had to say about it today, so we are here today to discuss the legal questions involved in this matter and I think the nature of those questions will become quite clear to you if we give the Assistant United States Attorney a chance to explain.

Mr. Polakoff: Glad to.

The Court: We won't have any witnesses today. This is not a contempt hearing at this point.

Mr. Polakoff: That is what I—I assumed it was a contempt hearing, your Honor.

The Court: It is not a contempt hearing. The question before us today is whether or not Mr. Harris can be given immunity under the particular statute which is involved in the grand jury's investigation, and immunity sufficiently

broad so as to protect him against any possible prosecution for any testimony that he may give.

Now, I am just as concerned as you are to be sure that he has such immunity before I direct him to answer the questions because a man has the right to claim his constitutional privilege and I will not direct him to answer the questions and forego that privilege unless I am satisfied [fol. 60] that he gets complete immunity under the statute for anything that he may say.

Now, to the extent that it is necessary for the Assistant United States Attorney to tell us this morning what happened before the grand jury in order to make this question clear, I will direct that nobody here reveal any of that material, but I don't think that you have to go into it in any such detail as to raise any real danger of violation of secrecy.

Mr. Maloney: No, I was only concerned with counsel having no objection to my going into his own client's testimony.

Mr. Polakoff: No, go right ahead.

The Court: I will direct him not to reveal what happens here. What I am interested in here—is it Mr. Maloney?

Mr. Maloney: That's correct, sir.

The Court: I think you ought to tell us, Mr. Maloney, more than you told me yesterday as to what this grand jury investigation is so that I can decide whether or not there is any—

Mr. Maloney: If your Honor please, will you mark this Grand Jury Exhibit No. 2?

(Marked Grand Jury's Exhibit 2.)

Mr. Maloney: If your Honor please, subject to no objection from defense counsel, may we have the courtroom cleared of uninterested persons?

The Court: I think we would have to under the circumstances.

Mr. Maloney: Have you any objection?

Mr. Polakoff: No.

(Courtroom cleared.)

[fol. 61] The Court: May I see that subpoena?

Mr. Maloney: If your Honor please, your Honor will note that Grand Jury Exhibit No. 2, as has been stated, is a copy of a subpoena which was served, duly served upon Mr. Harris for his appearance before the grand jury on Wednesday, I believe, of last week.

Upon his appearance, Mr. Harris was asked certain questions and he invoked his privilege under the Fifth Amendment.

He was thereupon directed by the foreman of the grand jury to reappear before the grand jury at ten o'clock yesterday morning.

Now, upon his appearance before the grand jury yesterday morning, he was informed by me—excuse me, does your Honor have a problem with the section involved?

The Court: Yes.

Mr. Maloney: That is the general conspiracy section, your Honor, of Title 18, which covers a conspiracy to defraud the United States, or any of its agencies, by any Federal crime of any nature. It is a general conspiracy section, your Honor, which would cover any and all Government—Federal Government violations; crimes, that is.

Upon his appearance before the grand jury yesterday morning, your Honor, he was informed by me that he certainly had a constitutional right not to answer my questions, but that the grand jury was inquiring into, namely, violations of the Federal Communications Act, Sections 501 and 203(c) of Title 47, and also into alleged violations of Title 18, Section 1952, which is the general racketeering and gambling section.

The Court: Yes. Will you just go a little slower? What are those sections again?

Mr. Maloney: Title 47, U.S.C. Section 501 and 203(c). Those are the Federal Communication violations.

[fol. 62] The Court: And the other one?

Mr. Maloney: The other one is the alleged violation of Title 18, United States Code, Section 1952, which is the general racketeering section covering interstate gambling.

Mr. Harris was asked whether or not he had attended a particular dice game in Florida on February of this year, at which time he invoked his privilege.

The Government, of course, has no argument against Mr. Harris invoking his privilege. However, he was subsequently asked other questions concerning another individual who made a phone call from Florida to New York City in order to lease the premises at which the dice game was held, and it is the Government's contention that from the FCC regulations that where an interstate wire communication is made—is used to promote or carry on an unlawful activity such as gambling, this is a violation of those regulations.

Now, it is to get at all the details concerning that particular communication or communications that the grand jury had saw fit to grant this particular witness immunity under Section 409 (1) of Title 47, which is a general immunity section concerned with witnesses involving violations of the FCC laws.

He thereupon still refused, at the direction of the foreman, to answer questions put to him concerning his knowledge of the leasing of these premises by phone and of knowing a certain party or parties who were the employers or partners of the man making the phone call.

It is the Government's position—I might say this has just a focal point, your Honor—every witness, the authorities teach us, *U. S.* v. *Rogers,* and on down, Supreme Court decisions—that every witness has a duty to testify before the grand jury.

[fol. 63] Balanced against this, the courts tell us we must balance his right against self-incrimination. I would be less than candid with the Court if I said that this individual would not be in jeopardy if he answered fully all the questions voluntarily.

Nevertheless, the grand jury has taken the extraordinary step of granting this individual, Mr. Harris, immunity from prosecution under the FCC Act and, therefore, I cannot see at all what prejudice will fall upon Mr. Harris should he now testify fully and honestly and truthfully before the grand jury, because I must remind Mr. Harris, who is sitting here, that any perjury he commits, of course, is a separate crime and is not covered by the general immunity clause.

Now, moving on one step further, your Honor, in order to find out all the details of this alleged violation of the FCC laws, that is, that this was an unlawful call to lease the premises for gambling, the grand jury naturally will have to go into a myriad of questions concerning the partners or partner, or employer or employers, behind the man who made this illegal call and, therefore, cannot be limited on those questions, and, therefore, can ask that under the authorities in *U. S.* v. *Marcus*, the citation, I believe, which is 310 F. (2d) 143, *Brown* v. *United States*, which is 359 U.S. 41, that the witness Harris be directed forthwith to answer the particular questions put to him and any others which are relevant to that particular FCC violation, your Honor.

The Court: Is there any evidence in addition to what you have stated as to what this grand jury is investigating? Is there any submission of an Assistant United States Attorney, or anything of that sort, which shows what is alleged? [fol. 64] Mr. Maloney: Well, obviously the testimony of other witnesses, which I am not at all prepared to reveal to Mr. Harris or his attorney, would show what we are investigating, but I believe it will suffice to tell the Court that we are investigating two things here: The violation of the FCC laws by the unlawful phone call, and also the nature and circumstances surrounding a dice game which occurred in Florida in February of this year, which we feel was a violation of Section 1952 in that certain person or persons who ran this game went across interstate lines to promote and carry on this particular dice game in Florida, and it would be the Government's contention also that this dice game was of a substantial nature involving numerous elements, important figures in organized crime, and in order to plan and promote this game there had to be numerous phone calls in order to set up the premises, in order to lease the premises, and so forth, so obviously this is a joint investigation. I would be less than—

The Court: You are telling me that the grand jury is investigating the allegedly illegal use of the telephone—

Mr. Maloney: That is correct, sir.

The Court: —with respect to leasing premises in which a dice game is supposed to have taken place, is that right?

Mr. Maloney: That is correct, sir.

The Court: And the crimes that they are investigating are the use of the telephone communications under the Communications Act?

Mr. Maloney: That is correct.

The Court: And also the substantive offense under 18 U.S.C. Section 1952, which seems to say that whoever travels in interstate or foreign commerce and uses communication facilities in interstate or foreign commerce with intent to distribute the proceeds of any unlawful activity, and so forth?

[fol. 65] Mr. Maloney: Right.

The Court: And the facility of interstate commerce they are talking about is the telephone?

Mr. Maloney: It could be, your Honor, or it also could be the other part of Section 1952 concerning his travel.

The Court: Oh, it could be just travel?

Mr. Maloney: It could be just travel.

The Court: The reason I asked you the question that I did is because in the Marcus case—

Mr. Polakoff: That's the one.

The Court: —nothing was said, but, you remember, reference was made to the authorization of the special attorney to take part in the grand jury proceeding. It was then decided that that authorization related to authorization under the Federal Communications Act, and so forth.

Is there anything like that here?

Mr. Maloney: No, no, there is no particular such authority right now, your Honor.

The Court: And your subpoena, which told Mr. Harris that he was to come down here and testify in connection with violation of Section 18 U.S. 371, which is the conspiracy section, that hasn't anything to do with the telephone?

Mr. Maloney: No, it did not.

The Court: There again that is different from the Marcus case, or one of these cases where the subpoena specifically referred to the Communications Act, right?

Mr. Maloney: That is correct, your Honor.

The Court: Now, I may have the advantage of Mr. Polakoff—I hesitate to think that I do—but I did spend the evening reading these cases last night.

Did you do that, too?

[fol. 66] Mr. Polakoff: No, your Honor. I—

The Court: Do you know the cases that we are talking about?

Mr. Polakoff: I know the Marcus case. I do not know the other cases, sir.

The Court: Do you know the Brown case?

Mr. Polakoff: I don't recall it offhand, your Honor.

The Court: Have you read the section of the statute?

Mr. Polakoff: Yes, sir, I did that this morning, very briefly.

The Court: Yes. Are you able to tell me what your views are on this now?

Mr. Polakoff: I will do the best I can, your Honor, extemporaneously. You can see what a disadvantage I am at, but I think I can improvise as I go along.

In the first place, your Honor, this is an investigation of a dice game. If I recall when Section 1952 and '53 were passed, which were racketeering statutes—I am not sure of this, your Honor, but I have been on committees passing on Federal legislation and I am just relying on my recollection—the original Act provided for immunity under 1952, as it does under 1953.

Congress did not see fit to give the U. S. Attorney the authority to grant immunity under '53, but did give him authority to grant immunity under 1953, which is the racketeering statute.

It is quite apparent that this is an investigation of gambling and it is solely governed by 1952.

I did not glance or did not even know the two sections of the Communications Act that were stated by Mr. Maloney because that would require going through almost the entire volume, but I did look at that section—I don't recall the number—that deals with immunity, and I think that [fol. 67] immunity goes solely to the Commission, the Communications Commission, because, if you will notice, that statute gives the Commissioners or Commissioner the right to issue a subpoena and compel testimony before the body, the Commission, and they, like the Security and Exchange Commission, may decide whether they want to give the witness immunity or not.

It is my opinion that the Communications Act does not deal with this kind of a crime; it deals with television, telegraph, radio and other means of permit for communications.

This is an attempt, in my opinion—and I say this advisedly—to circumvent the power to give immunity.

This, I believe, your Honor, is the first attempt that has been made to invoke this procedure. I know of my own knowledge that there have been dozens, perhaps hundreds of witnesses, who have claimed their privilege before the grand jury which was investigating gambling and at no other time prior to this, to my recollection—if I am wrong, I would ask Mr. Maloney to correct me—has the Communications Act ever been invoked.

Now, it is quite apparent that your Honor has done considerable research and I wish to say that your Honor has fairly and accurately stated the problem for both sides.

I don't think I am prepared to argue fully. I believe I am correct, and I would like to have an opportunity to make some research and be of some help to the Court in arriving at a conclusion.

The Court: Yes.

Mr. Polakoff: Now, I understand the point. I don't want to know the questions that were put to this witness at this particular time because we are really involved in a question of law. Mr. Maloney has stated that it is an investigation of two crimes.

[fol. 68] If he said—and I am not sure that he is correct—that a telephone call to lease a premises for gambling purposes comes under the Communications Act, would he limit it to the telephone call, because here we have a specific act, and I believe if your Honor will read one sentence a paragraph further on, they define facilities—the Act defines facilities and I think it also uses the word "telephone."

I am not sure of that, your Honor, but interstate travel, communication—and communication, I assume, means telephone.

Now, whether they use the word "telephone," or not, I am not at this moment sure but, in any event, it is quite apparent that this is an attempt to twist the lion's tail, or to corrupt the intent of Congress, and I would like to get

the reports and the debate in Congress on 1952 and to ascertain whether or not Congress deliberately eliminated 1952 from the immunity power.

Mr. Maloney: May I be heard just briefly your Honor?

The Court: Just a minute, Mr. Maloney. Then I will hear you.

But thanks to my nocturnal research last night, I am satisfied that the few cases which Mr. Maloney cites—the Brown case and the Marcus case—both hold that where the grand jury is investigating alleged violations of the Communications Act, putting it broadly, Section 409(1) of Title 47 does give the witness complete immunity against prosecution for any questions on any subject matters that he may testify to when he is compelled by an order from the court to testify, and if all that we have here is a grand jury investigating violations of the Communications Act and a witness subpoenaed testified and the subpoena said that the subject of inquiry was the violation of the Communications [fol. 69] Act, we would have a situation on all fours with those two cases, and I don't think I agree with you—in fact, I am sure, Mr. Polakoff—I don't agree with you that Section 409(1) referred only to proceedings before the Commission.

I think it is perfectly clear from the two cases—Brown and Marcus—that it refers to the grand jury investigations also, so I am sure you are wrong on that.

Now, the thing that troubles me, and the thing that was not made clear to me yesterday, was that apparently the grand jury is investigating something else, as well, namely, 18 United States Code, Section 1952 and '53.

Mr. Maloney: Just '52, your Honor.

The Court: What is the basis of immunity on that?

Mr. Polakoff: Just '52, your Honor.

The Court: '52?

Mr. Maloney: If your Honor please, I must direct your Honor's attention, first, in reply to your question, that in the Marcus case, that also was a joint investigation. As was stated in the case, he was also investigating gambling violations under 1084, which is the interstate transporta-

tion of wagering paraphernalia. That also goes with our present position.

Marcus was investigating two things: A violation of 1084 of Title 18, a gambling violation, and an alleged violation of the FCC regulation.

This grand jury is also investigating a violation of the FCC laws and also another gambling violation of Title 18. This happens to be Section 1952.

Now, clearly, if we grant this particular witness immunity from prosecution for any testimony elicited from him in connection with the inquiries of the FCC violation, he is certainly cloaked from further prosecution under Sec- [fol. 70] tion 1952; indeed, for even income tax violations, as the Marcus and Brown cases went on to say. The immunity is that broad, as far as those particular answers elicited from him.

The Court: It would be true if the grand jury were investigating violations of the Communications Act alone. Personally that is true.

Now, you say that in the Marcus case they were also investigating something else?

Mr. Maloney: That is correct, your Honor. If your Honor would just give me one moment, I can read to you the exact language given by the attorney.

On page 147, your Honor—does your Honor have it before you?

The Court: Yes.

Mr. Maloney: On the third paragraph on the righthand side there was a quote of Mr. Corey, who was the prosecutor there, in which he said to the Court:

"The grand jury is inquiring into violations under Statute 18 U.S.C. 1084 under the transmission of interstate wagering information; also under the Federal Communications Act, if I haven't already mentioned it."

This is rather identical with our position here, your Honor.

The Court: The Court goes on to say in the next sentence:

"The nature of the questions themselves which Marcus refused to answer plainly shows the unlawful use of the telephone communication in connection with gambling and racketeering which is involved."

[fol. 71] Now, the very first question—I think it was the very first question you asked Mr. Harris yesterday in the grand jury minutes was, "Were you engaged in a crap game in Miami?"

Mr. Maloney: That is correct, your Honor, and I am not asking for a direction to that particular question, but I thereafter went on to ask him concerning the background of a certain phone call, an unlawful phone call, to promote a gambling establishment.

Those questions, I feel now, fall under the purview of the FCC regulations, just as they did in Marcus. In Marcus that was a joint inquiry. There had to be an overlapping of questions involving 1084 as well as the Federal Communications Act, but in any event—that's the focal point of the whole issue before this Court—in any event, your Honor, once he is granted immunity under the FCC laws, he can no longer be touched by any prosecutor for a violation, the same violation of 1952.

The grand jury, as I say, has made an extraordinary exception to Mr. Harris. I don't see how he is prejudiced. I think he is in a rather tenuous position because now he has been given every privilege the Government has given, and always bear in mind, your Honor, it is the citizen's duty to come forward and help the Government.

The Court: The only question, Mr. Maloney, is what obviously you can accomplish through Mr. Harris as in fact you accomplished by the procedure you adopted. I understand that you intend to give him immunity, but I want to be very sure that he gets it before I direct him to answer.

Mr. Polakoff: And I think we have to be sure, your Honor, that both the U. S. Attorney and the grand jury have the authority to grant immunity. They cannot sub-[fol. 72] poena any witness for any crime and grant him immunity unless the statute specifically gives him that authority.

Now, may I make a suggestion to your Honor, in view of the fine research your Honor has done? It is my humble opinion that this is an investigation of a dice game or crap game, and the other arguments are just added for the purpose of ensnaring this defendant.

May I suggest that the U. S. Attorney present to your Honor—not to me—the grand jury minutes? There is no secrecy as far as your Honor is concerned, and I am sure that your Honor will then be in a much better position to judge what this investigation is about, what questions were put to other witnesses and what their testimony was.

Mr. Maloney: I have no particular objection to giving them to your Honor, the testimony of the relevant witnesses to this very issue before the Court. I will be happy to do so.

Mr. Polakoff: I suggest the testimony before this grand jury concerning this investigation, not what the Assistant thinks is relevant or not. Your Honor might disagree with him; I might disagree with him.

Mr. Maloney: Your Honor, might I also state this to the Court—and this is rather overwhelming hornbook law, and I can give your Honor dozens of citations, one in this circuit of only a year old, *U. S.* v. *Levine,* which sets forth that the defendant—the witness and his counsel have no standing whatsoever to inquire into the nature of the proceedings before the grand jury, or to the relevancy of certain questions that are to be elicited from his client. He has no standing whatsoever. The cases are very clear on that, Levine being the most recent one.

The Court: I don't think he is asking that.

[fol. 73] Mr. Polakoff: That's right.

Mr. Maloney: He is asking, your Honor, to find out whether this is in fact an FCC investigation or interstate gambling violation. I have said for the record that it is both, and that as far as his client's rights are concerned here, he has every protection afforded by the law once I have said that on the record and once I have established a basis for it in the grand jury, which I believe I have.

The Court: Why would you say that you wouldn't ask him that question again about his being—

Mr. Maloney: That, taken out of context, as it was, the very first question that was asked was a general question that could be strictly for the 1952 violation, but once I went into the wire questions and the purpose of the wire communication, then I was moving into the FCC area, just as I am sure in the Marcus case there had to be an overlapping between 1084 gambling violation and the FCC wire violation. It is impossible to separate the two completely.

The Court: Well, this is what I will do. As I said before, I am sure that the United States Attorney wants to give this witness immunity for some reason, but I have considerable doubt as to whether you have done it by the procedure that you have followed to date, so I will not direct the witness to answer these questions on the present record. I think you are going to have to start over again, Mr. Maloney. I think you ought to give him a subpoena which has a reference to an investigation of violations of the Communications Act, if that is what the grand jury is investigating, and I think that the questions that you ask him to lay a foundation for such a proceeding as this ought to be questions involving the use of the telephone and not just the general questions about was he in crap game.

[fol. 74] Now, when you do that, you will then bring yourself much closer within the rule of these two cases, and the only question remaining then will be whether or not the fact that you tell me the grand jury is also investigating some other crime is sufficient to prevent the rule of these two cases from applying.

Now, you say that it doesn't make any difference that they are investigating some other crime, and you point to Marcus but, as I read to you, although they said that in Marcus, they said in the very next breath that the questions relating to the Communications Act, and I also call your attention to the fact that in *Brown* v. *United States,* which is the case on which you primarily rely, where the statute involved was interstate trucking, the Court is careful to say that it is conceded that the questions were relevant to the grand jury's inquiry.

Now, I would think that if you lay a proper foundation you would then have only this one question that we need concern ourselves.

If you were investigating solely the Communications Act violations, there wouldn't be any doubt in my mind but that he had immunity.

Mr. Polakoff: I wouldn't question it.

The Court: I don't think Mr. Polakoff would contest it, but if you lay a proper foundation and if Mr. Polakoff wants to raise the question as to whether these cases apply, in view of the statement that some other statute is also under investigation, that will give him an opportunity to make that argument.

Mr. Maloney: I might say the Government doesn't completely agree with your Honor, but I will take your Honor's advice, and might I say that in view of your Honor's statements that we end the proceedings right now I will start from scratch, as it were.

[fol. 75] The Court: You will start from scratch, and Mr. Polakoff in the meantime can read some more law and see if he wants to make an issue of that one point, but that is the only point I see in the case.

Mr. Polakoff: Well, I want to thank your Honor personally on behalf of my client for the research you have done and for the interest you have shown in protecting his rights. I don't know whether I will agree with you or not, but if I don't it will be most respectfully, your Honor.

The Court: It often happens that one lawyer or the other disagrees, and sometimes both.

Now, I will not be in 318 after this week, but I am perfectly willing to carry this along with me next week.

Mr. Maloney: Yes, your Honor.

The Court: To avoid the necessity of burdening some other judge with it. I assume you are going to serve the subpoena and go through some more foundation.

Mr. Maloney: Yes, your Honor.

The Court: And then you can bring it up to me in chambers next week if you like.

Mr. Maloney: Yes, sir.

Mr. Polakoff: I have no objection to continuing the case before your Honor.

The Court: All right.

Mr. Polakoff: Now, your Honor, will the subpoena be served forthwith? There is no grand jury in session. I think the subpoena should be served. Whether he has the right to serve it in the courtroom or not, I don't know. I will waive that.

The Court: He hasn't got one in his pocket.

Mr. Maloney: No, I don't.

The Court: Because he didn't realize I was going to make him do it.

[fol. 76] Mr. Polakoff: Will you want to serve it—

Mr. Maloney: If your Honor please, I would want to serve it personally.

Mr. Polakoff: All right, go right ahead then.

Mr. Maloney: If counsel is agreeable, I will have it typed rather than cause the Government expense.

Mr. Polakoff: If you will make it next week, so in the meantime I have a chance to prepare myself.

Mr. Maloney: The subpoena will be served at the convenience of the grand jury, sir, and as soon as I can get it served.

Mr. Polakoff: Now, look, you are talking to an ex-Assistant who was chief of the Criminal Division at one time.

Mr. Maloney: I am not personal, sir, I am doing what my duty requires me to do.

The Court: You gentlemen work that out between you. I will be available next week if you want to bring this up to me again. After next week I won't. I am going away.

We stand adjourned now.

Mr. Maloney, here is your old subpoena. You may want that back.

[fol. 77] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—v.—

AL HARRIS, Appellant.

Excerpts from Appendix for the United States of America

[fol. 78]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 CR 664

U. S. A.,

vs.

AL HARRIS.

MINUTE RECORD OF COURT CLERK RELATING TO CONTEMPT PROCEEDINGS—August 8, 1963

Pres. Hon. Edward C. McLean, *D. J.*

The Court meets and is opened by proclamation.

Crime	Cosenza
Room 1505	Rptr. Cy Lubow

For the Govt.—Andrew J. Maloney, A.U.S.A.

For the Deft.—Moses Polakoff, Esq.

Contempt Proceedings begun.

Government's Testimony

Margaret T. Connelly—sworn.

Government's Exhibits

lid Grand Jury notes of M. T. Connelly taken at hearing before the Grand Jury this day, 8 Aug. 1963.

Al Harris—sworn

The Court adjudges that the defendant is in Contempt of Court and Sentences him to One Year at a place of confinement to be designated by the Attorney General of the U.S. Bail pending appeal fixed at $10,000. Remanded.
Proceedings concluded.
Court stands adjourned.

[fol. 79]

Transcript of Hearing Before Judge McLean and the Grand Jury—July 31, 1963

Witness: Margaret T. Connoly

Re: John Doe

(Room #1401)

MARGARET T. CONNOLY, having been sworn by the Deputy Forelady, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please?
A. Margaret T. Connoly. (spells)
Q. By whom are you employed?
A. United States Attorney's Office, Southern District of New York.
Q. In what capacity?
A. As a Grand Jury Reporter.
Q. Were you present this morning for the minutes of Mr. Harris before this Grand Jury?
A. Yes, sir, for the minutes.

Mr. Maloney: Would you please mark this Grand Jury Exhibit #1 of this date? (So marked.)

Q. I show you what has been marked Grand Jury Exhibit #1, and I ask you can you identify it?

A. Yes.

Q. What is it?

A. These are stenographic notes which I took at the Grand Jury hearing of Al Harris conducted by Mr. Maloney, Assistant United States Attorney.

Q. Would you please read those minutes?

(Witness reads minutes, Exhibit #1.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Maloney: If Your Honor please, it's the government's position that the phone call by Manarite to New York, while on its face it was a legitimate phone call for [fol. 80] lease of premises was really an illegitimate phone call for the purpose of promoting an unlawful activity, a dice game, in Florida, on these premises. And it's the government's position that Mr. Manarite was either in the employ or a co-conspirator of Mr. Harris, and therefore we feel that Mr. Harris comes under the immunity provision of the Federal Communications Act.

Judge McLean: What about those other questions you asked him?

Mr. Maloney: The immunity would also attach, of course, to any answer elicited after immunity had been granted, and it was merely to find out who were the other employers or partners of Mr. Manarite, who made this unlawful telephone call.

Judge McLean: You asked him something about was he in a dice game in Florida: did that have anything to do with the use of a telephone?

Mr. Maloney: That first question, I would not ask Your Honor to expect him to answer that first question I asked, but the other questions subject to a telephone call I would ask, because they would spell out the full scheme here, behind the leasing of this premises.

Judge McLean: It would involve further use of the telephone?

A. Well, it may have, Your Honor; we don't know at this point. But we do know there had to be a plan, once Mr. Manarite made the two telephone calls to Flushing, New

York, to lease these premises. We feel that Mr. Harris was in the employ of the others, and that Mr. Manarite was proceeding at Mr. Harris' or other partners' direction, and therefore we were finding out the purposes of the phone call, in an effort to find out who were the associates of Mr. Manarite or Mr. Harris.

[fol. 81] Judge McLean: Well, I would give that man a chance to have counsel, and argue this out. I have some doubt for the moment as to whether some of these questions are relevant to the statute that you're proceeding on. You can't very well expect him to get counsel in five minutes. Have him come in and tell him that, and we'll fix a date for some time tomorrow. The Grand Jury is going to be here all week, I take it?

Mr. Maloney: Yes, Your Honor, they are.

Judge McLean: Have him come in.

(Witness is recalled.)

Judge McLean: Mr. Harris, they've read to me the transcript of what transpired here this morning when you were being questioned, and I note that you say you want to have counsel, and I think you're entitled to have counsel. Now, can you get a lawyer by tomorrow morning, if you leave here now?

Witness: I think I should be able to; I'll try my best.

Judge McLean: Now, if we set this down for two o'clock tomorrow, Mr. Maloney, we can go into the argument part of it and the Grand Jury will still be available Friday morning?

Mr. Maloney: That's correct, Your Honor.

Judge McLean: And the Grand Jury's presence will not be necessary during this legal argument, so far as I can see. Do you want them there?

Mr. Maloney: I'd hesitate to have them there at two o'clock, Your Honor. I'm not certain whether or not they have to be present. I'd like some opportunity to check it.

Judge McLean: Well, if they are to be present, we'll [fol. 82] set it for some time in the morning, about noon. I have a hearing on tomorrow morning, and I'll go either way you say.

Mr. Maloney: All I can suggest, Your Honor, is that Mr. Harris have his attorney contact me tomorrow morning, and by that time I should know. And I'll contact Your Honor's chambers as soon as I can, whether or not the Grand Jury has to be present, and by that time we can make arrangements for tomorrow morning, or Friday morning.

Judge McLean: I don't see myself why they have to be there to listen to lawyers argue.

Mr. Maloney: I'm inclined to agree with you, Your Honor. I'll have to check and find out.

Judge McLean: Mr. Harris, you go away now. You can leave now,—make any calls you like; get a lawyer here tomorrow morning. Now, we'll have to let you know a little later whether it's going to be at twelve o'clock or two o'clock, but you can certainly get some lawyer by tomorrow, and you can get a chance to discuss with him the problem. Did you understand what the problem is?

Witness: Not thoroughly.

Judge McLean: I can appreciate that. But you get a good lawyer now, and discuss it with him, and I'll hear you tomorrow, and I'll hear the Assistant United States Attorney, and I'll make a decision as to whether you have to answer any questions or whether you don't. That's as far as I can go today, isn't it?

Mr. Maloney: That is correct, Your Honor.

Judge McLean: And you'll let me know tomorrow whether you'll come in at twelve o'clock or at two?

[fol. 83] Mr. Maloney: Yes, Your Honor.

Witness: How'll I know?

Mr. Maloney: Wait outside.

(Witness leaves room.)

Grand Jury Minutes—July 31, 1963

AL HARRIS, called as a witness, and having been duly sworn by the Deputy Forelady of the Grand Jury, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please.

A. Al Harris. (spelled).

Q. Now, Mr. Harris, before proceeding further, let me inform you that this Grand Jury is inquiring into violations of Title 47, United States Code, Section 501, 203(c) which is, namely, violations of the Federal Communications Act, and also into alleged violations of Title 18, United States Code, Section 1952. Let me also advise you you have a constitutional right not to answer any of my questions if you feel the answers might incriminate you. Do you understand that?

A. I do.

Q. Did you attend a dice game in Florida, February of 1963?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know a John Manarite, M-a-n-a-r-i-t-e?

A. I refuse to answer on the grounds it may tend to incriminate me.

[fol. 84] Mr. Maloney: Madam Foreman, would you direct him to answer that last question.

Forelady: You are directed to answer the last question.

The Witness: I don't understand.

Q. The last question was, do you know John Manarite, M-a-n-a-r-i-t-e?

A. I refuse to answer; it may tend to incriminate me.

Q. Well, let me advise you, Mr. Harris, that because this is a proceeding involving violations of Federal Communications Act that where you are directed to answer questions your privilege no longer applies since you are given immunity under Section 409(1) of Title 47, United States Code,

and, therefore, you must answer the questions. Do you understand that?

A. I don't. I would like to have counsel.

Q. Well, shall we proceed a little further? Do you know whether or not Mr. Manarite made a phone call to Flushing, New York, some time in January of 1963 in order to lease a premises for a dice game in Florida?

A. I refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Madam Foreman, would you direct him to answer that last question.

Forelady: You are directed to answer that last question.

The Witness: I don't understand.

Q. You don't understand the question?

A. I understand the question but I don't want to answer because it may tend to incriminate me.

[fol. 85] Q. Were you a partner in the dice game in Florida located at 194-40 North East 26th Street, Ojus, Florida, in February of this year?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Madam Foreman, will you direct him to answer that last question.

Forelady: You are directed to answer the last question.

The Witness: Can I have counsel?

Q. You may consult with counsel when you are given an opportunity to in a few minutes but do you refuse to answer that last question?

A. I refuse to answer on grounds it may tend to incriminate me.

Q. Now, Mr. Witness, was Mr. Carmine Trumanti a partner of yours in that dice game?

A. I refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Would you direct him to answer that last question, Madam Foreman?

Forelady: You are directed to answer the last question.

The Witness: I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: You may step outside and consult with your attorney, sir.

Witness leaves room and is recalled.

Q. Mr. Harris, you are reminded you are still under oath. What is the name of your attorney?

A. I want to get an attorney.

[fol. 86] Q. Didn't you have one here when you were here last week?

A. No.

Q. You had a week to appear back here, have you not?

A. Yes.

Mr. Maloney: Will you, Madam Foreman, direct this witness to wait outside.

Forelady: You're instructed to wait outside.

Witness leaves room.

[fol. 87]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

MOTION TO STRIKE AND EXPUNGE CERTAIN MATTER, ETC.—Filed April 3, 1964

Sir:

Please Take Notice that upon the annexed affidavit of Daniel H. Greenberg, sworn to April 3rd, 1964, the appellant will move this court at Room 1705, United States Court House, Foley Square, New York 7, New York, on the 7th day of April, 1964 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking and expunging from the appendix for the

United States of America pages therein designated 1a, 2a and 3a on the ground that the material contained in said pages did not form part of the proceedings in the court below and do not form official records which the court can otherwise notice judicially, and for such other and further relief as to the court may seem just and proper.

Dated: New York, New York, April 3rd, 1964.

Yours, etc.

Moses Polakoff, Attorney for Appellant, Office & P.O. Address, 475 Fifth Avenue, New York 17, N.Y.

To: Robert M. Morgenthau, Esq., United States Court House, Foley Square, New York.

[fol. 88] ATTACHMENT TO MOTION

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

State of New York,
County of New York, ss.:

Daniel H. Greenberg, being duly sworn, deposes and says: I am associate of counsel with Moses Polakoff, the attorney for the appellant herein. I am fully familiar with all of the facts of this case, and in particular with the matters to be discussed hereinafter. This affidavit is submitted in support of appellant's motion to strike and expunge from the appendix filed by the appellee, pages 1a, 2a and 3a. For the convenience of the court, these pages contain the following information:

1a. Minute record of court clerk relating to contempt proceedings.

2a and 3a. Pertinent provisions of American Telephone and Telegraph Long Lines Tariff.

Apart from appellant's self serving characterization of the contents of these pages, it is respectfully submitted that they form no part of the record of this case before the District Court and are not matters which can properly be noticed judicially by this court.

[fol. 89] With respect to the contents of 1a, labeled "Minute Record of Court Clerk relating to Contempt Proceedings", it is respectfully submitted that material appearing on said page is not and was not part of the record of the proceedings in the court below. In his appendix, appellant reproduced in full the docket entries of this case. Nowhere does it appear that the material contained in page 1a of appellee's appendix is identical with the material contained in the docket. The sole purpose of printing this material, it would seem, is to attempt to create an inference that the proceedings before Judge McLean in the District Court were open to the public by a statement that the court meets and is opened by proclamation. Counsel for appellant, Moses Polakoff, was present in court during the entire proceedings before Judge McLean, except that portion of the Grand Jury proceedings when both Judge McLean and Mr. Polakoff left the room. The proceeding was a Grand Jury proceeding and the record of this score is quite clear. Appellant's appendix contains everything that happened before Judge McLean and the Grand Jury on August 8th, 1963.

In an effort to track down the material reproduced by appellee at page 1 of its appendix, I went to the office of the District Court clerk on April 1, 1964 and asked to see the original from which this page was printed. The clerk in the file room refused to show it to me stating to me that it was not a public record, but was merely only an internal administrative record maintained by the clerk for his own use. When I called the printed page 1a to the attention of the person in the file room, I was referred to Mr. Ward, [fol. 90] the deputy clerk in charge of the file and I thereafter had a conversation with Mr. Ward concerning this matter. Mr. Ward stated to me that he had a personal vivid recollection of this particular matter because representatives of the United States attorney's office had asked to see this record and he refused to show it to them. There-

after, upon orders from the front office of the District Court clerk's office, he was directed to furnish this paper. He was then asked to certify it, which he refused to do stating it was not a filed document and therefore not subject to, or capable of being certified. He then permitted it to be taken from his possession by a requisition directed to the office of the clerk of the Court of Appeals. He then stated to me that he no longer had the paper in his possession, and in view of the fact that he had been required to show it to the United States attorney's representative, he was willing to show it to me but he was unable to do so for the foregoing reason.

I thereupon went to the office of the clerk of this court. I had previously checked the record on appeal in this case and did not find the paper reflecting this entry in the files. It was on my return trip to the clerk's office of this court that I brought to the attention of Mr. Fusaro this entire situation. Mr. Fusaro thereupon obtained the files of this case in this court and the paper which Mr. Ward told me had been requisitioned to this court's clerk's office was not among the papers on file.

In any event, it is respectfully submitted that this paper does not properly constitute a matter which should be set forth in an appendix to appellee's brief in this court. It was [fol. 91] not a part of the record in the court below; it forms no part of the record on appeal of this case; it was never shown to counsel for appellant at any time. If this paper is permitted to remain in the record on appeal herein, and if this case is hereafter reviewed by the Supreme Court of the United States, under the present circumstances, the clerk of this court would be required to certify this paper as a proper part of appellee's appendix to the Supreme Court. In so doing, that court would be caused to believe that this paper is a true part of the record of this proceeding in this court.

I respectfully submit it is not part of the proceedings of this case and should be ordered stricken and expunged for the foregoing reasons.

With respect to the so called "Pertinent Provisions of American Telephone and Telegraph Long Lines Tariff", it is respectfully submitted that this characterization is im-

proper and unwarranted. Moreover, this document was not before the court below, does not constitute an exhibit of this proceeding and is not a proper part of appellee's appendix. It is to be noted that during the course of the proceedings in the court below, appellant's counsel repeatedly urged the court that the government produce any rule, regulation or tariff which it claimed was pertinent to this proceeding. The government failed to do so there. What the government has now reproduced at pages 2a and 3a of its appendix, is an extract from a tariff published by the Telephone Company. It is in no way an official record nor a matter which this court could notice judicially. The [fol. 92] failure to produce any rule, regulation or tariff in the court below prevented appellant's counsel from raising any question based upon the relevancy, materiality or legality of the alleged tariff. Moreover, the failure to produce the entire tariff would seem to me to be indicative of the improper inclusion of said material as part of appellee's appendix.

It is to be noted that the two attorneys representing the government in this particular appeal had no part of the proceedings in the court below.

Wherefore, it is respectfully moved that appellant's motion be granted in all respects.

Daniel H. Greenberg

Sworn to before me this 3rd day of April, 1964.

Jean R. Sankowsky, Commissioner of Deeds, City of N. Y., N. Y. County Clk's #4-496, Commission Expires April 17, 1964.

[fol. 93] [File endorsement omitted]

Motion denied.

J.E.L., L.P.M., J.J.S., U.S.C. JJ.

August 26, 1964

[fol. 94]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394—September Term, 1963

Argued April 7, 1964

Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—v.—

AL HARRIS, Appellant.

Before: Lumbard, Chief Judge, Moore and Smith, Circuit Judges.

Appeal from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York, Edward C. McLean, J., sitting without a jury.

Affirmed.

Neal J. Hurwitz, Assistant U. S. Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and John E. Sprizzo, Assistant U. S. Attorney, New York, N. Y., on the brief), for appellee.

[fol. 95] Moses Polakoff, New York, N. Y. (Daniel H. Greenberg, New York, N. Y., on the brief), for appellant.

OPINION—July 22, 1964

LUMBARD, Chief Judge:

Al Harris appeals from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York arising out of his refusal to answer certain questions put to him before a grand jury in the Southern District on the ground that

he might thereby incriminate himself. We agree with the district court that inasmuch as Harris received immunity for his testimony pursuant to the provisions of the Federal Communications Act, his refusal to answer constituted contempt of court.

Harris was summoned to appear before the grand jury by a subpoena returnable on August 7, 1963.[1] The subpoena stated that the grand jury was investigating alleged violations of the Federal Communications Act, 47 U. S. C. §§203, 501. On that date, Harris appeared and stated his name but declined to answer any of the other questions propounded to him, which concerned a telephone call from Florida to New York City for the purpose of promoting [fol. 96] an illegal dice game in Florida. Later that morning, the grand jury and the government's counsel appeared before Judge McLean in the presence of Harris and his attorney. After hearing argument, Judge McLean directed the parties to appear before him again the following morning. At that time, he directed Harris to answer the questions put to him, on the ground that he had received immunity under the provisions of the Communications Act, 47 U. S. C. §409(l), and therefore could not incriminate himself by answering. When Harris once again refused to answer, the grand jury and the government's counsel again appeared before Judge McLean to ask his assistance. Judge McLean directed Harris to take the witness stand, when Harris again refused to answer, adjudged Harris in

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[1] Harris first appeared before the grand jury on July 31, 1963, pursuant to a subpoena which stated that the grand jury was investigating possible violations of the general conspiracy statute, 18 U. S. C. §371. Harris refused to answer the questions propounded to him, although the government's counsel advised him that the Federal Communications Act, 47 U. S. C. §409(l), afforded him immunity. Later that day the grand jury and the government's counsel appeared before Judge McLean, who, after a reading of the record of the grand jury's proceedings, directed that Harris appear again the following morning. At that time Judge McLean heard argument on whether §409(l) afforded Harris immunity. At Judge McLean's suggestion that the government lay a proper foundation for the grant of immunity, the subpoena here in question was issued stating that the grand jury was investigating possible violations of the Federal Communications Act.

propounded the same questions to him once more, and, criminal contempt and sentenced him to one year's imprisonment. From this judgment and sentence Harris appeals.

Harris relies principally on the claim that the grand jury was in fact investigating alleged violations of the Anti-Racketeering Act, 18 U. S. C. §1952, rather than alleged violations of the Communications Act. Inasmuch as the anti-racketeering statute makes no provision for the grant of immunity to a prospective witness, as does the Communications Act, Harris maintains that no immunity attached to him, and he could therefore not constitutionally be compelled to testify under penalty of contempt of court. We do not agree.

In its investigation of possible violations of the Federal Communications Act, the grand jury may well unearth evidence of violations of other criminal provisions as well. But the likelihood of such a development provides no support for Harris' position. If the statutory provision under which the grand jury is proceeding extends immunity to the prospective witness, that immunity extends to all testi- [fol. 97] mony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision. See *Heike* v. *United States,* 227 U. S. 131, 142-43 (1913). Moreover, the witness compelled to testify in a federal grand jury enjoys immunity as well from the use of that testimony by the prosecutorial agencies of state governments. *Murphy* v. *Waterfront Commission of New York Harbor,* United States Supreme Court, No. 138 October Term, 1963, June 15, 1964. Thus the fact that his testimony may be relevant not only to the specific provision upon which the grand jury's investigation is based but as well to other criminal provisions poses no dilemma for the prospective witness. The crucial question, therefore, is whether the specific immunity provision of the Communications Act was applicable to Harris' questioning.

Section 409(l) of Title 47 of the United States Code extends immunity for testimony given "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [the Federal Communica-

tions Act]." Harris contends that he should have been granted the right to summon several witnesses, including one or two members of the grand jury, to establish that the grand jury's investigation did not pertain to alleged violations of the Communications Act. We do not agree. The extent in general to which a witness may inquire into the subject matter of a grand jury investigation is severely circumscribed, in light of the secrecy in which grand jury proceedings have traditionally been held. *United States* v. *Levine*, 267 F. 2d 335, 336-37 (2 Cir. 1959). See *Blair* v. *United States*, 250 U. S. 273 (1919). In any event, we find that the government sufficiently established that the grand jury's investigation fell within the confines of §409(l).

First, the August 7 subpoena explicitly stated that the grand jury was engaged in investigation of possible vio- [fol. 98] lations of provisions of the Communications Act. Second, the government's counsel represented to the court that the grand jury was investigating possible violations of the Communications Act. Finally, the questions themselves revealed a substantial link with those sections of the Communications Act which prohibit any person from causing a telephone company to violate any provision of the Act. Cf. *In re Bart*, 304 F. 2d 631, 637 (D. C. Cir. 1962).

Harris maintains that under no circumstances could the activities inquired into in the grand jury have constituted a violation of the Communications Act. Rather, he suggests, these activities could at best have constituted violations of the general anti-racketeering statute, 18 U. S. C. §1952. In support of its own position the government weaves the following argument: The Federal Communications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U. S. C. §§203, 501. The tariff of the American Telephone & Telegraph Company, joined in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall "not be used for an unlawful purpose." Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the government here proffers. *Marcus* v. *United States,* 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U. S. 944 (1963). See also *United States* v. *Testa,* 326 F. 2d 730 (3 Cir.), cert. denied, 32 U. S. L. Week 3297 (Feb. 24, 1964). Moreover, the [fol. 99] government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investigation here is a proceeding "based upon or growing out of [an] alleged violation of [the Federal Communications Act]."

We also find no merit in Harris' claim of procedural irregularities in the adjudication of his contempt and in his sentencing. Contrary to his charges, the record establishes that the contempt proceeding was conducted in open court. Moreover, Judge McLean did not err in treating Harris' refusal to answer the questions after court direction to do so as a summary contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States,* 359 U. S. 41 (1959); *Levine* v. *United States,* 362 U. S. 610 (1960). Accordingly, we affirm the judgment of conviction of the district court.

We note that some members of the United States Supreme Court indicated their view, in a footnote to *United States* v. *Barnett,* 376 U. S. 681, 695 n. 12 (1964), that punishment of a criminal contempt by summary trial without a jury would be constitutionally limited to that penalty

provided for petty offenses. Inasmuch as the Court explicitly regarded this statement as *dictum*, and inasmuch as Harris' contempt was committed in the presence of the [fol. 100] court and the contempt proceeding was undertaken prior to compliance with the court's order, in both of which respects this case differs from *Barnett*, we uphold the power of the district judge to impose a sentence of one year's imprisonment, although such a sentence is in excess of that provided for petty offenses. 18 U. S. C. §1. See *Levine* v. *United States*, 362 U. S. 610 (1960); *Brown* v. *United States*, 359 U. S. 41 (1959).

The judgment of the district court is affirmed.

[fol. 101]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

AL HARRIS, Defendant-Appellant.

JUDGMENT—July 22, 1964

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 102] [File endorsement omitted]

[fol. 103]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND GRANTING MOTION TO STAY THE MANDATE—August 25, 1964

Moses Polakoff, New York, N. Y., for appellant.

The petition for rehearing is denied.

The motion to stay the mandate is granted on the terms and conditions provided in Rule 28(c) of the Rules of this Court.

J. E. L., L. P. M., J. J. S., U.S.C. JJ.

[fol. 104] [File endorsement omitted]

[fol. 105]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND GRANTING MOTION TO STAY THE MANDATE—Filed August 26, 1964

A petition for a rehearing together with a motion for a stay of the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for appellant,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and hereby is denied.

Further ordered that the motion to stay the issuance of the mandate be and it hereby is granted subject to the provisions of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 106] [File endorsement omitted]

[fol. 107]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING
IN BANC—August 25, 1964

Moses Polakoff, New York, N. Y., for appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 108] [File endorsement omitted]

[fol. 109]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Hon. Robert P. Anderson, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING
IN BANC—Filed August 26, 1964

A petition for a rehearing in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 110] [File endorsement omitted]

[fol. 111]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING MOTION TO EXPUNGE, ETC.—August 26, 1964

A motion having been made herein by counsel for appellant to expunge certain material from appellee's appendix,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 112] [File endorsement omitted]

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 114]

SUPREME COURT OF THE UNITED STATES

No. 526—October Term, 1964

AL HARRIS, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 14, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions 2, 3 and 4 presented by the petition which read as follows:

"2. Whether petitioner was offered a proper and fair hearing for criminal contempt under Rule 42 (a) Federal Rules of Criminal Procedure and whether Brown v. United States, 359 U.S. 41 should be reconsidered and overruled by this Court.

"3. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

"4. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FREE COPY

Office Supreme Court, U.S.
FILED
SEP 22 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 6

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1964

No.

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Al Harris prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 22, 1964.

Opinion Below

The opinion of the Court of Appeals in this case is reported at 334 F. 2d 460. This opinion is set forth as Appendix A, hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 22, 1964. A timely petition for rehearing was denied on August 25, 1964. The jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1). See Appendix B, *infra.*

Questions Presented

1. Whether the immunity provisions of one statute may be used to compel a witness to testify when in fact the subject matter under investigation concerns a violation for which no immunity may be granted.

2. Whether petitioner was afforded a proper and fair hearing for criminal contempt under Rule 42 (a) Federal Rules of Criminal Procedure and whether *Brown* v. *United States*, 359 U.S. 41 should be reconsidered and overruled by this Court.

3. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

4. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible.

Constitutional Provisions, Statutes and Rule Involved

The pertinent constitutional provisions, statutes and rule involved in this case are set forth in Appendix C, *infra*.

Statement of the Case

The Nature of the Proceedings

Petitioner Al Harris was convicted of criminal contempt of court and sentenced to one year's imprisonment, under Rule 42 (a), Federal Rules of Criminal Procedure, by summary disposition, for a contempt allegedly committed in the presence of the court. On August 8, 1963, petitioner was

brought before District Judge Edward C. McLean, in the District Court for the Southern District of New York, on oral motion of respondent to punish petitioner for wilful refusal to answer questions before a grand jury. The district judge had petitioner sworn as a witness and then, in the presence of the grand jury, and under a purported grant of immunity, put to him the questions petitioner had refused to answer before the grand jury. Upon petitioner's refusal to answer the same questions posed by the judge, he was thereupon immediately held to be in criminal contempt of court and sentenced as aforesaid.

The Record

The record in this case consists of the original typewritten record of proceedings in the district court and printed appendices filed in the court of appeals.

As part of its appendix filed in the court of appeals respondent printed three pages of material (Appellee's Appendix pp. 1a-3a) which did not form part of the proceedings in the district court. Prior to the argument of the appeal before the court of appeals under date of April 3, 1964, petitioner moved in the court of appeals to expunge or strike these pages from respondent's appendix as improper parts of an appendix. When this case was decided in the court of appeals no decision was rendered on petitioner's motion. Thereupon in petitioner's petition for rehearing *en banc* the court of appeals was reminded that it had not decided the pending motion to expunge or strike the offending material. However, on August 26, 1964, the day after the petition for rehearing was denied, the court of appeals denied petitioner's motion to expunge. (See Appendix B, *infra.*)

The Facts

On July 31, 1963, petitioner appeared pursuant to subpoena before a grand jury in the Southern District of New York. While before the grand jury he declined to answer questions put to him by the prosecutor (59a),[1] and he was thereupon brought before District Judge Edward C. McLean. The prosecutor explained to the Judge that they were conducting an investigation into interstate gambling and that one of the questions put to petitioner related to a telephone call to New York from Florida which "while on its face it was a legitimate phone call for lease of premises was really an illegitimate phone call the purpose promoting an unlawful activity, a dice game, in Florida on those premises" (Appellee's Appendix, 4a-5a). Since petitioner had no lawyer at that time the matter was adjourned to the next day to enable him to obtain counsel (Appellee's Appendix, 7a). The following day petitioner appeared before Judge McLean with counsel. At this time it appeared that the subpoena served upon him had noted that the subject matter under investigation before the grand jury involved an alleged violation of the general conspiracy statute (Title 18, United States Code § 371) (61a-65a). The prosecutor stated to the court that the investigation covered violations of the Federal Communications Act "and also into alleged violations of Title 18, United States Code § 1952, which is the general racketeering and gambling section" (61a). The prosecutor informed the court that it was proposed to grant petitioner immunity from prosecution under the immunity provisions of the Federal Communications Act (Title 47, United States Code, § 409(*l*) (62a-63a).

---

[1] All numbers in parentheses refer to Appellant's Appendix in the court of appeals, unless otherwise indicated.

The district judge refused to direct petitioner to answer the questions before the grand jury, on the ground that it did not appear from the questions that the investigation involved a violation of the Federal Communications Act, under which immunity is granted. He thereupon dismissed the proceeding, suggesting to the prosecutor that he start anew and lay a proper foundation for granting petitioner immunity, and issue a new subpoena for this purpose (73a-74a).

A new subpoena was thereupon served upon petitioner containing a designation that the alleged violation under investigation concerned Title 47, United States Code §§ 501 and 203(c) (20a). On August 7, 1963, petitioner appeared before the grand jury and declined to answer the questions put to him, invoking his constitutional privilege against self-incrimination. The questions asked petitioner on this occasion were identical to those asked on his first appearance before the grand jury. These questions concerned petitioner's participation in or knowledge of a dice game in Florida. The sole question relating to a telephone call concerned whether petitioner knew if John Manarite had made a telephone call in January or February, 1963, from Miami, Florida to Flushing, New York, in connection with the leasing of premises in Ojus, Florida, for conducting a dice game (21a-22a). Petitioner declined to answer all the questions, although he was purportedly granted immunity from prosecution for answering them (21a).

Petitioner was then brought again before Judge McLean, accompanied by the grand jury. After some discussion among the judge, the prosecutor and petitioner's counsel, the matter was adjourned until the next day (19a). The next day (August 8, 1963) petitioner again appeared before

the grand jury and the court, with his attorney, in secret session (27a). At the request of the prosecutor the court directed petitioner to answer the questions before the grand jury (29a). Thereupon, both the judge and petitioner's counsel left the courtroom (29a).

Petitioner again refused to answer the questions before the grand jury. The judge and petitioner's counsel reentered the courtroom. At the prosecutor's request, the grand jury stenographer was called as a witness. She read the questions petitioner had refused to answer. These were virtually identical to those which the court had refused to direct him to answer on August 1, 1963. The judge thereupon had petitioner re-sworn as a witness and he put the questions to petitioner, which petitioner continued to refuse to answer (37a-40a). The prosecutor asked the court to hold petitioner in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure (40a). Thereupon, the following colloquy occurred between petitioner's counsel and the court:

> "Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.
>
> I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.
>
> I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

(63) I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

Mr. Polakoff: Or a hearing on contempt open to the public?

The Court: This is open to the public.

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that (64) I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

He is remanded to the custody of the marshal." (40a-41a).

Thus petitioner was sentenced by the court, in extreme haste, without being offered the right of personal allocution, and without any pre-sentence report.

Reasons for Granting the Writ

This case is one of those few really important cases involving the use of the contempt power, immunity statutes and the constitutional privilege against self-incrimination. It involves also the requirements for fair hearings and proper sentences in summary contempt cases. The effective administration of federal criminal justice would seem to require review by certiorari of this case.

1. It is clear from the questions put to petitioner at his appearances before the grand jury that the investigation involved an alleged interstate dice game, in possible violation of 18 USC § 1952, which does not contain a witness immunity provision. The sole connection with any communications concerned the question of petitioner's knowledge of the subject matter of a telephone call from Florida to New York. The prosecutor sought to invoke the immunity provisions of the Federal Communications Act (47 USC § 409(*l*) because of his question about this one alleged telephone conversation. On August 1, 1963, the prosecutor requested the district court to direct petitioner to answer all the questions put to him. The court refused to do so, and dismissed the proceeding instead, stating that the questions failed to indicate a violation of the Federal Communications Act; and that no proper foundation had been laid for the invocation of the immunity provisions of this Act.

The judge told the prosecutor to start over again, which he did by merely changing the statutory citation on a subpoena. The court then used the same questions as a basis for holding petitioner in summary contempt. The new subpoena contained the citation of Title 47, United States Code, §§ 203(c) and 501. Section 203(c) provides that no

carrier under the jurisdiction of the Federal Communications Commission shall engage in communications unless a schedule of rates is filed with the commission and that thereafter all charges must conform to such schedule. Section 501 of this title refers to the criminal penalties for violation thereof. Nowhere in Section 501 is it made a crime for a user or customer of the telephone service to violate any regulation promulgated by a carrier. Section 409(*l*) of this title provides that no individual shall be prosecuted for or on account of any transaction which he is compelled to testify after having claimed his privilege against self-incrimination.

Unlike the cases which have preceded this one, here petitioner challenged the materiality of the questions as a basis for claiming a violation of the Federal Communications Act, which would thereby authorize the invocation of its immunity provisions. He sought and was denied a hearing to test whether any violation of the Federal Communications Act was involved and whether the offer of immunity under this statute was merely a guise and subterfuge in the conduct of an investigation under the Anti-Racketeering Act (18 USC § 1952), which does not contain any immunity provisions. *Watkins* v. *United States,* 354 U.S. 178, 208 fn 47; *Brown* v. *United States,* 359 U.S. 41, 42; *Levine* v. *United States,* 362 U.S. 610, 611; *United States* v. *Monica,* 317 U.S. 424; *Heike* v. *United States,* 227 U.S. 131. See *Alexander* v. *United States,* 181 F. 2d 480, where it was held that the immunity provisions of one statute may not be used as a cloak for an investigation really being conducted under another statute.

There are approximately forty-four different immunity statutes in federal law. See 72 Yale Law Journal 1568 (1963), Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading The Constitutional Tightrope,* at p. 1590, fn 100, App. A. at pp. 1611-1612. There are also many hundreds of criminal statutes that do not provide for witness immunity. If the prosecutor's theory in this case is accepted, any telephone call allegedly made in furtherance of any crime would be a violation of the provisions of the Federal Communications Act (47 USC §§ 203(c) and 501). We submit this is not the law and this proposition should be rejected by this Court. In our modern society and culture it is inconceivable that one could do all the things necessary to commit a crime, especially a federal crime, without the use of a telephone at some point. The immunity provisions of the Federal Communications Act were not intended by Congress to be and are not a general immunity statute.

Moreover, the statute invoked by the prosecution here, 47 USC § 203(c), makes it unlawful for the telephone company to charge rates without first filing rate schedules and thereafter to charge rates different than those set forth in said schedules. As the prosecutor pointed out in his statement to the district court on July 31, 1963, the telephone call about which he was inquiring, "on its face was a legitimate phone call for lease of premises" (Appellee's Appendix, pp. 4a-5a). This is not the case of telephones being regularly used to conduct gambling enterprises, as in both the cases of *Marcus* v. *United States,* 372 U.S. 944, and *Testa* v. *United States,* 376 U.S. 931, where certiorari

was denied.[2] We are here dealing with an isolated telephone call which is sought to be used as a basis for transforming the immunity provisions of this statute into a general immunity act.

Not once during the entire proceeding did the prosecutor advise the district court or the petitioner what tariff schedule or regulation allegedly had been violated. Only and for the first time in the court of appeals did the prosecutor state that the investigation involved a violation of General Regulation 9 of the American Telephone and Telegraph Company, Long Lines Tariff, F.C.C. No. 132 and F.C.C. No. 31 of the Southern Bell Telephone and Telegraph Company. In its Appendix in the court of appeals the government only sets forth Regulation 9. However, this is only one of twenty-six regulations which set forth the contractual agreement between the operating company and its subscribers and users of its service.

Moreover, at the hasty summary hearing held in the district court, petitioner's counsel stated that he had "not been told what tariff has been violated; no law has been cited or rule or regulation" (40a). The record in the court below is devoid of any tariff reference or any showing that any pertinent tariff or regulation thereof had been violated by what may have been said during the course of a private telephone conversation. In effect the prosecu-

[2] In his brief in opposition to the petition for certiorari, in the *Marcus* case, the Solicitor General argued that the telephone service in question must be wilfully, knowingly and regularly used for an unlawful purpose to constitute a violation of the Federal Communications Act. In the *Testa* case, the Solicitor General made the same argument. In both cases the records disclosed the regular and frequent use of telephones in gambling enterprises.

tion has attempted to transform what really are the contractural relations between a telephone company and its subscribers or the users of its facilities into some undefined crime. *Cf. Kelly* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 456 (DC ND Ill. 1962) and *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471 (DC ND Ill. 1962), judgment affirmed, 376 U.S. 782.

Only Congress is empowered to legislate and define crimes. This power is denied to a private company. When the prosecutor handed up to the court of appeals a portion of the general regulations of a tariff of the American Telephone and Telegraph Company, petitioner's counsel objected and moved to expunge such material from respondent's appendix in that court. This is one of the reasons why it is contended that petitioner did not have a proper hearing before the district court in this case.

It is respectfully submitted that the increasing use of the summary contempt power and the expanded use of immunity statutes in criminal investigations require this Court's guidance in the formulation of proper standards for the adjudication of such cases. It is further submitted that the court below erred in holding that the immunity provisions of the Federal Communications Act were applicable to the facts of this case, and accordingly review by certiorari seems warranted.

2. Petitioner was not afforded a proper and fair hearing for criminal contempt under Rule 42(a), Federal Rules of Criminal Procedure. The record in this case makes this abundantly clear. The purported hearing is set forth in full in petitioner's appendix, and the pertinent colloquy between petitioner's counsel and the district court is re-

printed *supra* pp. 6-7. Even under the loose rules of procedure which now govern summary contempt hearings, petitioner did not receive a fair hearing. The questions petitioner's counsel sought to explore and have answered at a proper adversary hearing were foreclosed by the district court's hasty action in summarily adjudging petitioner in contempt and immediately imposing sentence. Petitioner was denied the right to present a defense. Petitioner was even denied the right of personal allocution prior to sentencing in violation of the decisions of this court. (*Green* v. *United States,* 365 U.S. 301; *Hill* v. *United States,* 368 U.S. 424; *Andrews* v. *United States,* 373 U.S. 334).

It is petitioner's contention that the use of the summary contempt procedure under Rule 42(a), Federal Rules of Criminal Procedure, where the court acts as the source of the questions put to a witness instead of remaining as an impartial judge, as authorized in *Brown* v. *United States, supra,* is improper. In the light of the recent decision in *United States* v. *Barnett,* 376 U.S. 681, the rule in *Brown* v. *United States* should be reconsidered. Until the questions raised in the *Barnett* case were considered by this Court there appeared to be no occasion for the Court to reexamine the use of summary contempt procedures in the present type of situation.

It is submitted that the use of summary contempt procedures in situations of this kind is unwarranted and improper, and that *Brown* v. *United States, supra,* should be overruled. It is to be noted that petitioner complained before the district court that he was being tried in secret (74a), and unlike *Levine* v. *United States, supra,* he demanded a public hearing. The record of this case discloses

that he was not granted a public hearing, or any hearing worthy of the name.

3. In view of the fact petitioner was sentenced to one year's imprisonment prior to this court's decision in *United States* v. *Barnett, supra,* the court of appeals, after this case had been argued, asked counsel for their views for the possible impact of the *Barnett* decision on the sentence imposed in this case. Petitioner urged that all sentences in excess of those imposed for petty offenses required trial by jury and the procedural safeguards set forth in the Fifth and Sixth Amendments to the Constitution. In approving the sentence of one year the court of appeals referred to two purported distinctions between this case and *Barnett.* The court stated that petitioner's "contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the court's order". (See Appendix A, *infra,* p. 7a). We submit these distinctions are artificial and are really not in harmony with the objectives of the three opinions of this Court in the *Barnett* case, which question in all contempt cases the power of the courts tc impose punishments in excess of that for petty or trivial offenses, where trial by jury is not afforded. In *District of Columbia* v. *Clawans,* 300 U.S. 617, 627, this Court held "that irrespective of the severity of the offense, the severity of the penalty imposed might entitle a defendant to the right of trial by jury." This Court held in *Barnett* that the alleged contemnors were not entitled to trial by jury as a matter of constitutional right. However, it noted that even in the absence of such right the sentence that is imposed might require trial by jury of the offense charged. Under the circumstances, the propriety of using summary contempt procedures where imprisonment in excess of that

fixed for petty offenses under 18 USC § 1 is imposed, should be reviewed by this court.

4. It would also seem that a sentence of one year's imprisonment imposed in a summary contempt proceeding is constitutionally impermissible. A defendant in a criminal case is entitled to the safeguards of the Fifth and Sixth Amendments to the Constitution, relating to indictment, trial by jury and the effective assistance of counsel, as well as other procedural safeguards, where he receives a sentence of one year's imprisonment. In this case petitioner was deprived of all these rights, prior to the speedy imposition of the one year's sentence. His counsel was not even permitted to have the issues raised in this case made the subject of a proper adversary hearing before the court adjudged petitioner in contempt and immediately sentenced him (40a-41a).

It is quite clear from the opinion of Mr. Justice Black in *Barnett* that "a majority of the Court would now overrule *Green* (*Green* v. *United States*, 356 U.S. 165) in part, by holding that if a criminal contempt charge is tried without allowing the defendant a jury trial, punishment is constitutionally limited to that customarily meted out for 'petty offenses'" (376 U.S. 681, 727). If this Court would now so hold, then, in any event, the sentence of one year imposed against petitioner is not constitutionally permissible and should be vacated as void in law.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

MOSES POLAKOFF,
Attorney for Petitioner

DANIEL H. GREENBERG
Of Counsel

September 21, 1964.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394—September Term, 1963.

(Argued April 7, 1964 Decided July 22, 1964.)

Docket No. 28524

UNITED STATES OF AMERICA,

Appellee,

—v.—

AL HARRIS,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Appeal from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York, Edward C. McLean, *J.*, sitting without a jury.

Affirmed.

NEAL J. HURWITZ, Assistant U. S. Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and John E. Sprizzo, Assistant U. S. Attorney, New York, N. Y., on the brief), *for appellee.*

Appendix A—Opinion of United States Court of Appeals

MOSES POLAKOFF, New York, N. Y. (Daniel H. Greenberg, New York, N. Y. on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

Al Harris appeals from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York arising out of his refusal to answer certain questions put to him before a grand jury in the Southern District on the ground that he might thereby incriminate himself. We agree with the district court that inasmuch as Harris received immunity for his testimony pursuant to the provisions of the Federal Communications Act, his refusal to answer constituted contempt of court.

Harris was summoned to appear before the grand jury by a subpoena returnable on August 7, 1963.[1] The subpoena stated that the grand jury was investigating alleged violations of the Federal Communications Act, 47 U. S. C. §§203, 501. On that date, Harris appeared and stated his name

[1] Harris first appeared before the grand jury on July 31, 1963, pursuant to a subpoena which stated that the grand jury was investigating possible violations of the general conspiracy statute, 18 U. S. C. §371. Harris refused to answer the questions propounded to him, although the government's counsel advised him that the Federal Communications Act, 47 U. S. C. §409 (*l*), afforded him immunity. Later that day the grand jury and the government's counsel appeared before Judge McLean, who, after a reading of the record of the grand jury's proceedings, directed that Harris appear again the following morning. At that time Judge McLean heard argument on whether §409(*l*) afforded Harris immunity. At Judge McLean's suggestion that the government lay a proper foundation for the grant of immunity, the subpoena here in question was issued stating that the grand jury was investigating possible violations of the Federal Communications Act.

but declined to answer any of the other questions propounded to him, which concerned a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida. Later that morning, the grand jury and the government's counsel appeared before Judge McLean in the presence of Harris and his attorney. After hearing argument, Judge McLean directed the parties to appear before him again the following morning. At that time, he directed Harris to answer the questions put to him, on the ground that he had received immunity under the provisions of the Communications Act, 47 U. S. C. §409(*l*), and therefore could not incriminate himself by answering. When Harris once again refused to answer, the grand jury and the government's counsel again appeared before Judge McLean to ask his assistance. Judge McLean directed Harris to take the witness stand, propounded the same questions to him once more, and, when Harris again refused to answer, adjudged Harris in criminal contempt and sentenced him to one year's imprisonment. From this judgment and sentence Harris appeals.

Harris relies principally on the claim that the grand jury was in fact investigating alleged violations of the Anti-Racketeering Act, 18 U. S. C. §1952, rather than alleged violations of the Communications Act. Inasmuch as the anti-racketeering statute makes no provision for the grant of immunity to a prospective witness, as does the Communications Act, Harris maintains that no immunity attached to him, and he could therefore not constitutionally be compelled to testify under penalty of contempt of court. We do not agree.

In its investigation of possible violations of the Federal Communications Act, the grand jury may well unearth evidence of violations of other criminal provisions as well. But the likelihood of such a development provides no support for Harris' position. If the statutory provision under which the grand jury is proceeding extends immunity to the prospective witness, that immunity extends to all testimony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision. See *Heike* v. *United States,* 227 U. S. 131, 142-43 (1913). Moreover, the witness compelled to testify in a federal grand jury enjoys immunity as well from the use of that testimony by the prosecutorial agencies of state governments. *Murphy* v. *Waterfront Commission of New York Harbor,* United States Supreme Court, No. 138 October Term, 1963, June 15, 1964. Thus the fact that his testimony may be relevant not only to the specific provision upon which the grand jury's investigation is based but as well to other criminal provisions poses no dilemma for the prospective witness. The crucial question, therefore, is whether the specific immunity provision of the Communications Act was applicable to Harris' questioning.

Section 409(*l*) of Title 47 of the United States Code extends immunity for testimony given "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [the Federal Communications Act]." Harris contends that he should have been granted the right to summon several witnesses, including one or two members of the grand jury, to establish that the grand jury's investigation did not pertain to alleged viola-

tions of the Communications Act. We do not agree. The extent in general to which a witness may inquire into the subject matter of a grand jury investigation is severely circumscribed, in light of the secrecy in which grand jury proceedings have traditionally been held. *United States* v. *Levine*, 267 F. 2d 335, 336-37 (2 Cir. 1959). See *Blair* v. *United States*, 250 U. S. 273 (1919). In any event, we find that the government sufficiently established that the grand jury's investigation fell within the confines of §409(*1*).

First, the August 7 subpoena explicitly stated that the grand jury was engaged in investigation of possible violations of provisions of the Communications Act. Second, the government's counsel represented to the court that the grand jury was investigating possible violations of the Communications Act. Finally, the questions themselves revealed a substantial link with those sections of the Communications Act which prohibit any person from causing a telephone company to violate any provision of the Act. Cf. *In re Bart*, 304 F. 2d 631, 637 (D. C. Cir. 1962).

Harris maintains that under no circumstances could the activities inquired into in the grand jury have constituted a violation of the Communications Act. Rather, he suggests, these activities could at best have constituted violations of the general anti-racketeering statute, 18 U. S. C. §1952. In support of its own position the government weaves the following argument: The Federal Communications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U. S. C. §§203, 501. The tariff of the American Telephone & Telegraph Company, joined

in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall "not be used for an unlawful purpose." Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the government here proffers. *Marcus* v. *United States,* 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U. S. 944 (1963). See also *United States* v. *Testa,* 326 F. 2d 730 (3 Cir.), cert. denied, 32 U. S. L. Week 3297 (Feb. 24, 1964). Moreover, the government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investigation here is a proceeding "based upon or growing out of [an] alleged violation of [the Federal Communications Act]."

We also find no merit in Harris' claim of procedural irregularities in the adjudication of his contempt and in his sentencing. Contrary to his charges, the record establishes that the contempt proceeding was conducted in open court. Moreover, Judge McLean did not err in treating Harris' refusal to answer the questions after court direction to do so as a summary contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States,* 359 U. S. 41 (1959); *Levine* v. *United States,* 362 U. S. 610 (1960). Accordingly, we affirm the judgment of conviction of the district court.

We note that some members of the United States Supreme Court indicated their view, in a footnote to *United States* v. *Barnett,* 376 U. S. 681, 695 n. 12 (1964), that punishment of a criminal contempt by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses. Inasmuch as the Court explicitly regarded this statement as *dictum,* and inasmuch as Harris' contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the court's order, in both of which respects this case differs from *Barnett,* we uphold the power of the district judge to impose a sentence of one year's imprisonment, although such a sentence is in excess of that provided for petty offenses. 18 U. S. C. §1. See *Levine* v. *United States,* 362 U. S. 610 (1960); *Brown* v. *United States,* 359 U. S. 41 (1959).

The judgment of the district court is affirmed.

APPENDIX B

Opinion of United States Court of Appeals on Petition for Rehearing and Motion to Stay the Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

AL HARRIS,

Appellant.

MOSES POLAKOFF, New York, N. Y.,
for Appellant.

The petition for rehearing is denied.

The motion to stay the mandate is granted on the terms and conditions provided in Rule 28(c) of the Rules of this Court.

J. E. L.
L. P. M.
J. J. S.
U.S.C. JJ.

25 August 1964.

Appendix B—Opinion of United States Court of Appeals on Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

AL HARRIS,

Appellant.

MOSES POLAKOFF, New York, N. Y.,
for Appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Aug. 25, 1964.

APPENDIX C

Constitutional Provisions, Statutes and Rule Involved

Constitution of the United States

AMENDMENT V

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: . . .

TITLE 18, UNITED STATES CODE

§ 1. OFFENSES CLASSIFIED

Notwithstanding an Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Appendix C—Constitutional Provisions, Statutes and Rule Involved

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

TITLE 47, UNITED STATES CODE

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Appendix C—Constitutional Provisions, Statutes and Rule Involved

§ 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

§ 409. Hearings—Filing of initial decisions; exceptions

* * * * *

Self-incrimination

(1) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the

ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42(a)

Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 526

AL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Vol. II, 19-25; Pet. App. 1-7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1964 (Vol. II, 26). A petition for rehearing was denied on August 25, 1964 (Vol. II, 37, 41; Pet. App. 8). The petition for a writ of certior-

ari was filed on September 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the immunity provisions of the Federal Communications Act of 1934 were properly applied to petitioner.

2. Whether the district court could proceed under Rule 42(a), F.R. Crim. P., to try petitioner for contempt and sentence him to imprisonment for one year.

STATUTES AND RULE INVOLVED

Section 203(c) of the Communications Act of 1934, 48 Stat. 1064, 1071, 47 U.S.C. 203(c), provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; * * *.

Section 409(i) of the Communications Act of 1934, 48 Stat. 1064, 1097, 47 U.S.C. 409(l), provides in pertinent part:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act * * * on the ground or for the rea-

son that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 501 of the Communications Act of 1934, 48 Stat. 1064, 1100, as amended, 68 Stat. 30, 47 U.S.C. 501, provides in pertinent part:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *.

Rule 42(a), F. R. Crim. P., provides:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the

facts and shall be signed by the judge and entered of record.

STATEMENT

On July 31, 1963, in the Southern District of New York, petitioner was called as a witness before a grand jury which was investigating possible violations of the Communications Act of 1934 and 18 U.S.C. (Supp. V) 1952 (interstate travel or transportation in aid of racketeering enterprises). Government counsel advised petitioner that the inquiry concerned possible violations of Sections 203(c) and 501 of the Communications Act and 18 U.S.C. 1952, and that petitioner had the constitutional right to decline to answer questions on grounds of possible self-incrimination (Vol. II, 8, 9). Thereafter, petitioner refused to answer, on grounds of possible self-incrimination, questions as to whether he had attended a dice game in Florida in February of 1963, whether he had been a partner in that dice game, whether one Carmine Tramunti had been a partner with petitioner in that dice game, whether petitioner knew one John Manarite, and whether petitioner knew if Manarite had made a telephone call in January 1963 to Flushing, New York, in order to lease premises for a Florida dice game (Vol. II, 8-10). Government counsel advised petitioner that inasmuch as the inquiry concerned possible violations of the Communications Act, he would be given immunity from prosecution under that Act for his testimony and therefore could not rely upon the claim of privilege (Vol. II, 8-9). Petitioner persisted in his refusal to answer the questions and re-

quested counsel. Thereupon, petitioner was called before District Judge McLean, who continued the proceedings until the following day so that petitioner could obtain counsel (Vol. II, 6-7).

On August 1, 1963, government counsel, petitioner and petitioner's attorney appeared before Judge McLean. During argument, government counsel stated that the grand jury was investigating possible violations of Sections 203(c) and 501 of the Communications Act and 18 U.S.C. 1952 arising out of the placement of certain telephone calls from Florida to New York City regarding the promotion of an illegal dice game (Vol. I, 61-64). At the conclusion of the proceedings, the court said that it had "considerable doubt" regarding the propriety of the procedure employed, and that it would not direct petitioner to answer the particular questions (Vol. I, 73). The court said that the grand jury subpoena should contain reference to an investigation of violations of the Communications Act, and that the particular questions to be propounded should involve "use of the telephone and not just the general questions about was he in [a] crap game" (Vol. I, 73).

On August 7, 1963, petitioner re-appeared before the grand jury pursuant to a subpoena to appear and "give testimony in regard to an alleged violations of Sections #501 and #203(c), Title #47, United States Code" (see Vol. I, 20). Government counsel advised petitioner of his constitutional right against self-incrimination, and, when petitioner pleaded the privilege to one question, advised that the inquiry concerned possible violations of Sections 203(c) and 501 of the Commu-

nications Act, and that petitioner would be given immunity under Section 409(i) of that Act for his testimony (Vol. I, 20-21). Petitioner said that he understood (Vol. I, 20-21). Thereafter, petitioner refused to answer before the grand jury, on grounds of possible self-incrimination, the following questions (Vol. I, 22-24, 26):

Q. Now, once again, Mr. Harris, let me ask you: do you know of a phone call made by one, John Manarite, in January or February of this year, from Florida to Flushing, New York, in connection with the leasing of a premises for the purpose of establishing a dice game in Ojus, Florida?

Q. Now, Mr. Harris, do you know whether or not Mr. Manarite used a pay telephone?

Q. Do you know whether or not he used a private premises to make that telephone call?

Q. Do you know Mr. Harris, whether anybody else's premises was used by Mr. Manarite for that telephone call?

Q. Mr. Harris, do you know whom Mr. Manarite was working for, or in partnership with, in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone, from Florida to Flushing, New York?

Q. Mr. Harris, do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti?

Q. Mr. Harris, do you know whether or not, at the time of the making of this phone call, Mr.

Manarite was in the employ, or in partnership with Mr. Thomas Lucchese?

Q. Mr. Harris, I ask you: do you know any of the person or persons who were the employers or partners of Mr. Manarite, at the time of the telephone call in question?

Q. Mr. Harris, in connection with this phone call, were you a partner in the operations of the dice game at the premises in Ojus, Florida?

Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

Shortly thereafter, petitioner and his attorney, government counsel and the grand jury appeared before Judge McLean. The transcript of the grand jury proceedings was read (Vol. I, 9), and argument was heard regarding the propriety of granting immunity under the circumstances. The court, desiring "further thought on the matter," adjourned the proceedings until the following day (Vol. I, 18).

On the following day—August 8, 1963—Judge McLean and all parties appeared, together with the grand jury, in the grand jury room. After pointing out that he was satisfied that petitioner would receive complete immunity for his testimony, Judge McLean directed petitioner to answer the questions before the grand jury (Vol. I, 29). After Judge McLean and petitioner's attorney left the room, government counsel propounded the same questions to petitioner which he had refused to answer the previous day. Petitioner refused to answer such questions on

grounds of possible self-incrimination (see Vol. I, 32-35, 52-55).

Later the same day, petitioner and his attorney, government counsel and the grand jury appeared before Judge McLean. The court was "opened by proclamation" (Vol. II, 1). After the transcript of the grand jury proceedings was read (Vol. I, 32-35), petitioner was sworn as a witness and the court propounded the same questions which petitioner refused to answer before the grand jury and directed that he answer each question (Vol. I, 37-39). Petitioner refused to answer the questions on the ground of possible self-incrimination (Vol. I, 37-39). At the conclusion of the questioning, the court said, "Does anybody want to say anything further?" (Vol. I, 39). Pursuant to the request of government counsel, the court repeated that petitioner would be given immunity from prosecution for his testimony (Vol. I, 39). The following transpired (Vol. I, 39-41):

> [by the court] Do you still refuse, Mr. Harris?
> The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.
> The Court: Anything further?
> Mr. Maloney [government counsel]: No, your Honor. I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.
> Mr. Polakoff [counsel for petitioner]: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an op-

portunity to discuss them and consider them with my client and look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

* * * *

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

* * * *

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

After fixing bail pending appeal, the court announced that it would "be glad to consider a reduction of sentence" if petitioner so moved after having testified before the grand jury (Vol. I, 45).

DISCUSSION

1. Petitioner first contends, in essence (Pet. 8-12), that the immunity provisions of the Communications Act were improperly applied to him in that the grand jury was not really investigating possible violations of the Communications Act but was interested primarily in an alleged interstate dice game in violation of 18 U.S.C. 1952. The short answer, however, is that Section 409(i) of the Act requires only that the cause or proceeding be "based upon or growing out of any alleged violation of this Act." The fact that the grand jury was also investigating possible violations of 18 U.S.C. 1952 (interstate travel or transportation in aid of racketeering enterprises) does not mean that the immunity provisions of the Communications Act were inapplicable. See *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; *United States* v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931, both of which rejected similar arguments.

The ten questions propounded to petitioner before the grand jury and the court—which, upon his refusal to answer, formed the basis for his contempt adjudication—concerned possible unlawful use of telephone service in violation of the Communications Act. Petitioner's argument that it is not a violation of the Communications Act "for a user or customer of the telephone service to violate any regulation promulgated by a carrier" was also made and rejected in the cases cited above. Under Section 501 of the Communications Act, "[a]ny person who willfully and

knowingly * * * causes or suffers to be done any act, matter or thing * * * prohibited or declared to be unlawful * * *" in that Act commits an offense punishable by fine and imprisonment. Section 203(c) of the Act provides that no carrier shall provide communications service "except as specified" in its tariff. The tariff filed by the American Telephone and Telegraph Company, concurred in by the Southern Bell Telephone and Telegraph Company, provides (as do those of most, if not all, such tariffs) (Vol. II, 2-3):

> The service is furnished subject to the condition that it will not be used for an unlawful purpose.

Thus, one who "willfully and knowingly" utilizes telephone services for the purposes of promoting gambling operations or other purposes unlawful under the laws of a State or the United States causes the telephone company to provide service "for an unlawful purpose." This constitutes a violation of Section 203 (c) of the Communications Act and is punishable under Section 501 of that Act.[1] See *Marcus* v.

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[1] In addition to the provisions of Section 501 of the Communications Act, penalizing anyone who willfully causes or suffers an act to be done in violation of the Act, the general aider and abettor statute, 18 U.S.C. 2, may also be applied to make individuals liable as principals to violations of Section 203(c) of the Act. Section 2(b) of Title 18, U.S.C., punishes as a principal one who "willfully *causes* an act to be done which if directly performed by him *or another* would be an offense against the United States" (emphasis added). It is well established that one who causes the commission of an offense by an innocent agent or instrumentality is guilty as

United States, supra; Testa v. *United States, supra.* A number of persons have been convicted for violation of Sections 203(c) and 501 of the Communications Act for such misuse of telephone services. *United States* v. *Andrews et al.*, Crim. No. 10,288 (E.D. Ky.) (judgments of convictions entered on July 31, 1962), pending on appeal, No. 15,623, C.A. 6; *United States* v. *Whitaker*, Crim. No. 21,122 (E.D. Pa.) (judgment of conviction entered on July 24, 1963).

Since petitioner's initial contention has twice been squarely rejected by the Third Circuit and there is no conflicting decision of any other court of appeals, and since this Court has twice denied certiorari on this issue in recent Terms, we do not believe that the first question presented in the petition warrants consideration by this Court.

2. Petitioner contends that in light of the dictum in *United States* v. *Barnett*, 376 U.S. 681, 694-695 n. 12, that "[s]ome members of the Court are of the view that * * * punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses," he could not be tried summarily under Rule 42(a) of the Federal Rules of

---

a principal (*United States* v. *Giles*, 300 U.S. 41; H. Rep. No. 304, 80th Cong., 1st Sess.; see Reviser's Note to 18 U.S.C. 2(b)), even though he was incapable in the first instance of committing the substantive crime (S. Rep. No. 1020, 82d Cong., 1st Sess., Sec. 17B, pp. 7-8; see *Phillips* v. *United States*, 218 F. 2d 385, 387 (C.A. 9); *Logsdon* v. *United States*, 253 F. 2d 12, 15 (C.A. 6); *Benchwick* v. *United States*, 297 F. 2d 330, 332-333 (C.A. 9); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D. Ill.)).

Criminal Procedure and given a sentence of one year's imprisonment. See *District of Columbia* v. *Clawans*, 300 U.S. 617, 627-628. We believe this case to be distinguishable from *Barnett* for several reasons, among which are that petitioner's contempt was committed in the presence of the court and that this case does not involve, as did *Barnett*, the imposition of punishment "*after* compliance with the court's order has been secured." 376 U.S. at 754 (Mr. Justice Goldberg, dissenting, emphasis in original).

In the Matter of Local 825, International Union of Operating Engineers, No. 488, this Term, pending on petition for certiorari, involves a similar question as to a court's power summarily to impose punishment for contempt beyond that permitted for petty offenses. We have there acquiesced in the granting of the petition on that issue. In order to enable the Court to consider the basic question as it arises in various circumstances, we do not oppose review here of the same issue.

CONCLUSION

The grant of the petition for a writ of certiorari should be limited to the second question presented.

Respectfully submitted.

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NOVEMBER 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 755254 395

FILE COPY

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 6

AL HARRIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 526

AL HARRIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

Statement

This memorandum is respectfully submitted in reply to the Memorandum for the United States submitted in this cause. In its memorandum the United States states that it acquiesces in the grant of the petition herein on the issue of a court's power summarily to impose punishment for contempt beyond that permitted for petty offenses. For the reasons set forth hereinafter, we believe that the grant of the petition for a writ of certiorari herein should not be so limited, but rather should be on all the issues raised in the petition.

Discussion

In the petition for a writ of certiorari, four questions were presented for consideration by the Court. (See page

2 of the petition.) In its memorandum the Government recast these questions as two questions. (See page 2, Memorandum for the United States.) In so doing the Government attempted to narrow the issues which the Court should consider, and has asked this Court not to consider the merits of petitioner's entire case. Without attempting to restate the reasons set forth for granting the writ on all issues, we believe that a hearing on the merits of the entire case is warranted by the questions presented by petitioner.

I.

With respect to the applicability of the immunity provisions of the Federal Communications Act (47 U.S.C. 409 (*l*)), to the investigation being conducted into alleged violations of 18 U.S.C. 1952, this Court has not heretofore considered this question on the merits. The expanding use of the contempt power through the application of various immunity provisions in regulatory commission enactments to non-related criminal investigations would make it appropriate for this issue to be considered by the Court. Moreover, in stating the issues involved in this case, petitioner must necessarily set forth the underlying factual basis and legal contentions advanced by him for his invocation of his constitutional privilege against self-incrimination and for his refusal to answer questions before the grand jury. A proper presentation of this issue appears to be necessary for a proper consideration of the case.

II.

In its statement of the questions presented the Government has framed as the second question the issue of whether "the district court could proceed under Rule 42(a),

F.R. Crim. P., to try petitioner for contempt and sentence him to imprisonment for one year." Petitioner contends that he was not afforded a proper and fair hearing for criminal contempt under Rule 42(a), F.R. Crim. P., by the invocation of the summary contempt procedures and in the conduct of said hearing before the district court. Petitioner further submits that this Court's decision in *Brown* v. *United States*, 359 U.S. 41, should be reconsidered and overruled. When the issues of fact of this proceeding are considered in terms of the type of hearing afforded him, petitioner believes that the entire concept of summary contempt procedures should again be reviewed by this Court. This is especially so in light of the issues now raised as to the imposition of severe sentence in contempt cases. Although the question of whether petitioner had a fair hearing, under summary contempt procedures, is really part of the question presented in the Government's version of this issue, and as to which it acquiesces in the grant of the petition, yet its discussion of this question is in terms only of the propriety of the sentence imposed. Accordingly, we believe that the question of whether petitioner was afforded a proper and fair hearing, and by the use of summary contempt procedures should be heard.

III.

Although this Court held in *United States* v. *Barnett*, 376 U.S. 681, that trial by jury is not constitutionally required in cases of criminal contempt, nevertheless the various opinions written in said case appear to hold that where a sentence imposed is in excess of that authorized for petty offenses, trial by jury would seem to be required in light of the sentence imposed. See *District of Columbia* v.

Clawans, 300 U.S. 617. Accordingly, the issue of trial by jury in contempt cases should again be considered, since it is part of the essential issue presented for consideration in this case.

CONCLUSION

The grant of the petition for a writ of certiorari should be on all of the questions presented by petitioner, and this case should be set for full argument before the Court.

Respectfully submitted,

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Counsel for Petitioner

DANIEL H. GREENBERG
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Office-Supreme Court, U.S.
FILED
FEB 2[illegible] 1965
JOHN F. DAVIS, CLE[illegible]

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted]6. 6

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 526.

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the court of appeals (R. 72-77) is reported at 334 F. 2d 460.

JURISDICTION.

The judgment of the court of appeals was entered on July 22, 1964 (R. 77-78). A petition for rehearing was denied on August 25, 1964. The petition for a writ of certiorari was filed on September 22, 1964, and certiorari was granted on December 14, 1964. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The order granting the writ of certiorari (R. 82) limited the questions for consideration to Questions 2, 3 and 4 presented by the petition. These are renumbered:

1. Whether petitioner was offered a proper and fair hearing for criminal contempt under Rule 42(a), F. R. Crim. P., and whether *Brown v. United States,* 359 U. S. 41, should be reconsidered and overruled by this Court.

2. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

3. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceding is constitutionally permissible.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The pertinent constitutional provisions, statutes, and rules are set forth in the Appendix, *infra,* pp. A1-A7.

STATEMENT.

The petitioner was summarily sentenced to one year's imprisonment for criminal contempt for his refusal to answer certain questions that the court ordered him to answer after he had refused to answer the same questions before a grand jury in the Southern District of New York.

Petitioner first came before the grand jury on July 31, 1963, in compliance with a subpoena which referred only to the general conspiracy statute, 18 U. S. C. § 371. He refused to answer questions propounded to him that day on the ground of privilege, having first stated that he would like to have counsel (R. 66). He was brought, with the grand jury, before District Judge McLean (R. 61), who continued the proceeding to the next day, so that petitioner could obtain counsel (R. 64). At that time (R. 62) and on the next day (R. 48), when petitioner appeared with temporary counsel, the government maintained that asking a question of the petitioner concerning another individual who made a legitimate telephone call to lease premises entitled the government to insist upon an answer under the immunity provisions of the Federal Communications Act, 47 U. S. C. 409(l). The court refused to order petitioner to answer the questions because it was not satisfied that the grand jury was engaged in an investigation involving the Communications Act, and that no such investigation was made apparent by the questions put to petitioner (R. 57).

Thereafter, in compliance with a new subpoena, which referred to 47 U. S. C. § 203(c) and § 501, petitioner appeared before the grand jury on August 7, 1963 (R. 17), and declined to answer certain questions on the ground of privilege, although he was told by government counsel that "the Grand Jury, after you invoke your privilege against self-incrimination, may direct you to answer questions, and by so doing, grant you immunity" under 47 U. S. C. § 409(l) (R. 18-21).

Promptly thereafter, the petitioner and the grand jury appeared before Judge McLean. This was within the grand jury proceeding and regarded as secret, although petitioner's counsel was present (R. 23). Petitioner's counsel explained his position in this new proceeding: that petitioner was without funds, that counsel was appearing on short notice, and that the matter should be continued so that counsel could be retained (R. 4-5). At the request of the court, counsel remained to represent petitioner because the court did not wish to delay (R. 6-7). The government proceeded with its request for assistance of the court to the grand jury (R. 4-5), asserting that by reason of 47 U. S. C. § 409(l), petitioner was granted immunity and should be informed that he did not have a privilege to refuse to answer. After some discussion, the matter was adjourned to the next day, the court requesting petitioner's counsel to "stay in that long" (R. 16). The court did not regard the matter as a contempt proceeding at that time (R. 16) and counsel for petitioner indicated that he did not wish to remain in the case if there was a contempt proceeding.

On the following day, August 8, Judge McLean and all parties together with the grand jury, assembled. Judge McLean did not regard the matter as a contempt proceeding (R. 23). He directed the petitioner to answer the questions before the grand jury, and he and counsel for petitioner retired from the room (R. 24).

Petitioner declined to answer the questions he was directed to answer by Judge McLean. The Judge and petitioner's counsel re-entered the room. After the transcript of the grand jury proceeding was read, the government counsel requested the court "to direct this witness once again to answer the questions that were put to him" (R. 30). Thereupon, petitioner was sworn, and the court repeated to him the questions[1] and directed him to answer, but petitioner refused on the ground of privilege (R. 30-32).

---

1. The questions, seriatum, are:

Do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida to

Government counsel then requested that petitioner be found in contempt of court "under Rule 42(a)." Counsel for petitioner protested, and requested adjournment and a public hearing where he would be permitted to call witnesses. The court denied the request, adjudged petitioner guilty of criminal contempt and imposed the sentence of one year's imprisonment.[2]

Flushing, New York in connection with the leasing of a premises in Ojus, Florida for the purpose of a dice game?

Do you know whether or not Mr. Manarite used a pay telephone?

Do you know whether or not he used a private premises to make that telephone call?

Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

Do you know whom Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or partnership with one Carmine Tramunti?

Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

Mr. Harris, I ask you, do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?

In connection with this phone call, were you a partner in the operation of the dice game at the premises in Ojus, Florida?

Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

2. The following transpired (R. 32-33):

[by the court]: Do you still refuse Mr. Harris?

The Witness: I respectfully refuse to answer on the grounds that it would tend to incriminate me.

The Court: Anything further?

[government counsel]: No, your Honor, I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.

[petitioner's counsel]: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the min-

The court admitted the petitioner to bail, recognizing that the issues raised were not frivolous (R. 35).

On August 9, 1963, Judge McLean filed a certificate in accordance with Rule 42(a), F. R. Crim. P. (R. 39-40). The certificate recites, *inter alia*, that petitioner failed to state any valid reason why he should not be held in contempt. The record discloses that the court did not ask the petitioner to make a statement before sentence.

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utes and I want to have an opportunity to discuss them and consider with my client and to look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

[petitioner's counsel]: Or a hearing on contempt open to the public?

The Court: This is open to the public.

[petitioner's counsel]: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

The court of appeals affirmed petitioner's conviction and sentence. It stated that this Court's statement in a footnote to *United States v. Barnett*, 376 U. S. 681, 694-695, n. 12, was *dictum*. It further stated that the instant case was distinguished from *United States v. Barnett, supra*, inasmuch as petitioner's contempt was committed in the presence of the court, and the contempt proceeding was undertaken prior to compliance with the court's order (R. 77).

The petition for a writ of certiorari was not opposed by the government with respect to the question, whether the district court could proceed under Rule 42(a), F. R. Crim. P., to try petitioner for contempt and sentence him for imprisonment for one year.

SUMMARY OF ARGUMENT.

1. Petitioner did not have a proper and fair hearing before he was convicted and sentenced. If a contempt of court was committed, the offense occurred when petitioner violated the direction, first given, to appear before the grand jury and answer the questions involved. Thereafter, the court was simply employing a "procedure" that avoids compliance with Rule 42(b). To the extent that *Brown v. United States,* 359 U. S. 41, sanctions such "procedure," it should be overruled.

2. Petitioner was entitled to a jury trial under the provisions of Article III, Section 2 of the Constitution and under the Fifth and Sixth Amendments and a prosecution by information or indictment under Rule 7(a), F. R. Crim. P., before he could be sentenced to a term of imprisonment for one year. In addition, this Court has the power and authority to so declare by virtue of its function as the final arbiter of proper administration of justice in the federal courts. The severity of the sentence, imprisonment for one year, imports a crime which is not punishable except in accordance with the dictates of the Constitution. *District of Columbia v. Clawans,* 300 U. S. 617.

3. The district court was without authority to sentence petitioner for criminal contempt, summarily, to a term of imprisonment in excess of six months. This limitation is derived from the fact that punishment upon summary trial is constitutionally limited to that penalty provided for petty offenses. *United States v. Barnett,* 376 U. S. 681, 694-695, n. 12.

ARGUMENT.

I. The Petitioner Was Deprived of His Fundamental Right to Hearing on Notice When No Countervailing Need for Haste or to Preserve the Dignity and Respect of the Court Appears Since There Was No Such Open Threat to Orderly Procedure as to Justify Instant Punishment.

The general procedure for the handling of criminal contempts of court is set forth in Rule 42(b), Federal Rules of Criminal Procedure (*infra*, p. A6), which is stated in mandatory terms. Rule 42(a) is expressly described as an exception, and is in permissive terms. Certainly the distinguishing factor between the application of Rule 42(a) and the application of Rule 42(b) is not whether the event occurred in the presence of the court. *Cf. Panico v. United States*, 375 U. S. 29.

The particular exceptional circumstances which seem most eligible for the precipitous procedure of Rule 42(a) are those of a kind characterized by in 18 U. S. C. § 401(1) (*infra*, p. A2) as misbehavior disruptive of court proceedings or the conduct of its business.[3] Such construction is historically consistent with due concern for controlled usage of the contempt power. See, *Cammer v. United States*, 350 U. S. 399; *Offutt v. United States*, 348 U. S. 11; *Nye v. United States*, 313 U. S. 33. Indeed, the limits of the power to punish for contempt are "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231. See also Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts*, 37 Harv. L. Rev. 1010.

This Court has recognized that the power to impose punishment for criminal contempt without notice or hearing is capable of grave abuses. *In re Oliver*, 333 U. S. 257,

3. Rule 42(a) does not expressly restrict itself to the category of contempts described in 18 U. S. C. § 401(1). However, the necessity for immediate action without regard to the minimal protections afforded by Rule 42(b) in order to preserve order and decorum, is more readily apparent than as to the conduct described in § 401(3).

274. Certainly the instant case, or indeed any case bottomed on a refusal to answer questions before a grand jury is not an example of such open threat to orderly procedure that *instant* suppression and punishment was necessary, as distinguished from due and deliberate procedure. *Cooke v. United States,* 267 U. S. 517, 536.

If, as this Court indicated in *Brown v. United States,* 359 U. S. 41, 50, the objective of the district court, in following the procedure here adopted, was more intent upon aiding the grand jury than in punishing the witness, then it is pertinent to note first, that the contempt having been committed, nothing was to be gained by disregarding Rule 42(b) except the elimination of basic rights due any defendant for the mere sake of speed, albeit the delay attendant upon the observance of Rule 42(b) procedures would have been relatively slight. Second, the choice of the court was not between punishment or no punishment, but between *coercion* and procedures which might lead to punishment. *Marcus v. United States,* 310 F. 2d 143, cert. denied, 372 U. S. 944.[4] As the latter case shows, nothing is lost to the dignity of the court by compliance with Rule 42(b). Punishment without trial is not our democratic way of life or law.

In this case, on August 7, the government sought the aid of the court when petitioner refused to testify. The court, on August 8 directed petitioner to return before the grand jury and to answer the questions involved. Petitioner returned to the grand jury but refused to answer the questions. Promptly the government returned to the court, again to seek its assistance.[5] Not one word was said by government counsel at that time that he would

4. The denial of a basic right needs no other evidence of prejudice. Nevertheless, it may be noted that in *Marcus v. United States,* 310 F. 2d 143, cert. denied, 372 U. S. 944, where the asserted contempt was the refusal to testify, as here, the punishment after trial pursuant to Rule 42(b) was six months' imprisonment.

5. Goldfarb, in *The Contempt Power,* at 106-109, sets out in detail the ritual employed by courts to avoid giving the witness-defendant a hearing under Rule 42(b).

seek summary disposition under Rule 42(a). Not one word was said by the court that it regarded the proceeding as one for contempt. Only after the court put each question to petitioner and directed him to reply, which petitioner respectfully declined to do, did government counsel then request the court to find petitioner in contempt of court under Rule 42(a). Promptly the court not only adjudged petitioner guilty of criminal contempt, but imposed the sentence of one year's imprisonment.

The court noted that petitioner was making a record to test on appeal issues which it then regarded as not frivolous and granted bail. If the only result of the application of Rule 42(b) were to afford an opportunity for reflection, let alone an opportunity for counsel to subpoena witnesses, the reason for Rule 42(b) would be justified. Instead petitioner was summarily punished by a severe sentence, one year's imprisonment. See collection of cases noted in *Brown v. United States, supra,* 359 U. S., at 58-59, note 11 (dissenting opinion).

Petitioner submits that the precipitous procedure here employed was not necessary to uphold the dignity of the court. See *Offutt v. United States, supra.* There was no demonstrated need for speed, and indeed no resultant benefit. Petitioner, when he was brought into court the second time on August 8, had already violated a court order. The effect of the second "go-round" was to deprive him of his rights and the intangible benefits that flow from Rule 42(b), since having originally disobeyed the court's order there was no reason on this record to believe that he would answer the same questions because the court was now asking them, rather than the prosecutor. The procedures here adopted only serve to diminish the popular respect for courts and the law. In the exercise of its supervisory power over the administration of criminal justice in the federal courts, this Court can and should insist upon procedural regularity to foster that respect.[6]

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6. Insistence upon such safeguards is indicated in the Federal Rules of Criminal Procedure. Rules 1, 2, and 7(a), *infra,* p. A5.

The court failed to afford petitioner an opportunity to speak before imposing sentence. Rule 32(a), F. R. Crim. P., *infra,* p. A6.

Petitioner submits that he was entitled at the very least to an opportunity to prepare his defense, to present evidence, and to develop those matters which are pertinent to the offense, conviction and sentence, at a hearing that the public knew was open.[7]

II. The Court Should Not Have Sentenced Petitioner to One Year's Imprisonment for Criminal Contempt Without a Jury Trial.

Although he was sentenced to one year's imprisonment the petitioner in this case received no jury trial. Petitioner acknowledges that this Court has indicated, but not unanimously, that criminal contempt is not an offense which entitled the alleged contemnor to a jury trial as a matter of constitutional right. *United States v. Barnett,* 376 U. S. 681.[8]

Petitioner will not attempt to repeat the discourses of the dissenting Justices in *United States v. Barnett, supra,* at 725-726, and in *Green v. United States,* 356 U. S. 165, 193-219. They develop as soundly and persuasively as possible the proposition that criminal contempt is a crime which entitles the defendant to a trial by jury.

A majority of this Court concluded in *United States v. Barnett, supra,* that the power of courts to try criminal contempts existed as an exception to the constitutional

7. Opening a courtroom, which had been previously closed because the grand jury was in session, a few minutes before the contempt proceeding is not a public hearing, because the public would not know when it was to be opened after it had been sealed.

8. The Court answered in the negative the following question: "Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to a trial by jury for the criminal contempt with which they are charged?"

guarantees of a jury trial. But this conclusion did not rest on express or implied provisions of the Constitution. To the contrary, the Constitution is explicit, unambiguous and without exception insofar as a jury trial is here concerned. Section 2 of Article III and the Sixth Amendment of the Constitution. Rather, the conclusion was rested upon the view that the power of courts to try criminal contempts was unlimited at the time the Constitution was adopted and that such continued power was essential to preserve the efficiency and dignity of the courts.

However, the historical data upon which the majority of this Court relied only establishes the existence of the contempt power at the time the Constitution was adopted: it yields no evidence of the intention of the framers of the Constitution. We believe it pertinent to note here that, consistent with the concept of the Constitution as a living thing, the Court should re-examine the previously endorsed meaning of "criminal prosecution" in the Constitution.[9] *Cf. Gideon v. Wainwright,* 372 U. S. 335; *Mapp v. Ohio,* 367 U. S. 643.

The persistent proclamation of "self-restraint" as a limit upon the exercise of the contempt power so evident in the history of its application—and the historically recorded public recoil from believed judicial "abuses", which were indeed only examples of an extended use—of the contempt power, bespeak a concept of the contempt power at the time of the Constitution, and for a century and a quarter thereafter, substantially limited as compared to that evidenced by the more recent uses.[10] Certainly the most common applications of the power in the century and more following the adoption of the Constitution—as distinguished from the occasional exceptions—is more consistent with the

9. See, *Burnet v. Coronado Oil & Cas. Co.,* 285 U. S. 393, 405 (Brandeis, J., dissenting).

10. See, *e.g., United States v. Shipp,* 214 U. S. 386, and 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction.

conclusion that the contempt power was not without limit than the conclusion drawn by a majority of the Court, that the power is unlimited.[11] Indeed, unlimited exercise of the contempt power has not been conceded.[12] *Nye v. United States,* 313 U. S. 33, 49, and *In re Michael,* 326 U. S. 224, 227 (advocating restricted use to avoid contempt determinations of guilt without jury trial); *Offutt v. United States,* 348 U. S. 11. And the rumblings of discontent with the denial of a jury trial as an exception to the constitutional guarantee are not alone of recent vintage. See, *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 425-426 (Holmes and Brandeis, JJ. dissenting: "[where] there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts.").[13]

Furthermore, the Court seems to assume that the necessity of power and its summary use are coextensive. It is submitted that the need for the contempt power does not justify summary use in all cases.[14] And, it is submitted

11. So here, this Court might also avoid the constitutional issues through the exercise of its supervisory powers over the administration of criminal justice in the federal courts. *Cf. McNabb v. United States,* 318 U. S. 332.

12. The criminal standard of proof, guilt beyond a reasonable doubt, applies to criminal contempts. See, *e.g., United States v. Fleischman,* 339 U. S. 349, 363; so also with Sixth Amendment or Due Process rights. *E.g., Cooke v. United States,* 267 U. S. 517, 534; *In re Savin,* 131 U. S. 267; *Ex parte Terry,* 128 U. S. 289; *In re Oliver,* 333 U. S. 257 (public hearing); *cf. Levine v. United States,* 362 U. S. 610.

13. In *Gompers v. United States,* 233 U. S. 604, 610-611, Justice Holmes stated: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way." See also, Frankfurter and Landis, *Power to Regulate Contempts,* 37 Harv. L. Rev. 1010, 1042, 1046.

14. See, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendant's Rights,* 65 Yale L. J. 846.

that the reasons justifying the power of the courts to initiate criminal contempt proceedings do not justify the denial of a jury trial in all cases.[15] See *In re Oliver*, 333 U. S. 257, 275. As there indicated, the most likely subjects for the exercise of the contempt power without jury trial are those who breach courtroom decorum, thereby requiring immediate action to prevent demoralization of the court's authority. But even here the protections of Rule 42(b) may be applicable. *Panico v. United States*, 375 U. S. 1.

The instant case is clearly not one which exemplifies the need for the application of summary contempt power without jury trial. The contempt in the presence of the court was in effect recreated by the court's action. Indeed, the district court recognized that there was no willful, improper, or evil motive behind the refusal to obey its command. Surely petitioner was entitled to the due deliberation of a jury to resolve the issue of guilt before being sentenced to one year's imprisonment.

The Constitution specifically excludes certain classes of cases from the protection of the grand jury. Contempt of court is not one of them. Significantly, Rule 7(a), F. R. Crim. P., at the very least, does not permit a prosecution for a term of imprisonment which may exceed one year for any criminal offense without an indictment.

III. Petitioner's Sentence of One Year's Imprisonment for Criminal Contempt Without a Trial by Jury Is Constitutionally Excessive.

It is the contention of petitioner that the district court was without constitutional power to impose upon him a sentence in excess of that provided for petty offenses.[16]

In *United States v. Barnett, supra*, 376 U. S., at 695 n. 12, this Court stated:

> "In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the Court are of the view that, without regard to the seriousness of the offense,

15. *Ibid.*, at 856-858.
16. 18 U. S. C. 1 (*infra*, p. A2).

> punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses."

In view of the dissenting opinions joined in by four Justices, petitioner believes that the statement of the Court quoted above reflects the opinion of a majority of the Court. In *Rollerson v. United States,* F. 2d (D. C. Cir. October 1, 1964), the court of appeals stated:

> "Since Rollerson's contempt conviction, a majority of the Supreme Court has indicated in United States v. Barnett, 376 U. S. 681 (1964), that the punishment which may be imposed after a non-jury contempt conviction is limited to that provided for petty offenses."

See also, *Randazzo v. United States,* 339 F. 2d 79, 81, a decision of the court of appeals for the Fifth Circuit.

The court below regarded Footnote 12 as *dictum.* It also said that the *dictum* was inapplicable because petitioner's contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the district court's order, in both of which respects the instant case differs from *Barnett.*

Although Footnote 12 is denominated *dictum,* this Court expressly stated that it was required to make the statement [17] as a matter of effective administration of jus-

17. The statement in a recent article [Tefft, *United States v. Barnett: "'Twas A Famous Victory",* in *The Supreme Court Review —1964,* 123, at 135.] that under "the new rule of constitutional law, the summary power of the United States courts to punish for criminal contempt would appear to be equated with a prosecution of a minor offense such as an infraction of a traffic regulation", is absurd. Six months' imprisonment for criminal contempt is a far greater sentence than is usually given for violations of the criminal provisions of the anti-trust laws. And to cite one example, the maximum imprisonment for wilful failure to file an income tax return is one year. 18 U. S. C. § 7203. There are countless offenses on the books, for which the maximum imprisonment is not in excess of one year. Furthermore, the failure to testify in a criminal contempt proceeding after one is given immunity is generally a prelude to indictments for the offenses being investigated by the grand jury, for which the witness has been offered immunity.

tice in view of the impending contempt hearing therein. The authoritative quality of the statement, therefore, remains unimpaired.

The test whether initially the power exists to impose a one year sentence for criminal contempt without a jury trial does not turn on whether there has or has not been compliance with the order of the court, or whether the contempt was or was not committed in the presence of the court. If it is constitutional to impose a sentence of more than six months for criminal contempt where there has been no jury trial, it would be constitutional to impose a sentence for as many years as the trial judge desires.

We submit that the reasoning in Footnote 12 in *United States v. Barnett* is constitutionally correct and should not be overturned. Any legal proceeding in which an individual may be imprisoned for more than six months should be treated as a criminal prosecution as contemplated by the Constitution. Any theoretical inconvenience would be far outweighed by an increased respect for law in general and the judiciary in particular. The machinery of justice is best served by faithful observance of constitutional principles, rather than a surrender of those principles on grounds of expediency.

CONCLUSION.

For the reasons given, the judgment against the petitioner should be reversed, and the conviction set aside.

Respectfully submitted,

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February, 1965.

APPENDIX.

Constitutional Provisions, Statutes and Rules Involved.

Article III, § 2, Par. 3 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

18 U. S. C. 1 provides:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402 provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in the case the accused is a natural person, the sum $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U. S. C. 3691 provides:

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

Section 203(c) of the Communications Act of 1934, 48 Stat. 1064, 1071, 47 U. S. C. 203(c), provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; * * *.

Section 409(l) of the Communications Act of 1934, 48 Stat. 1064, 1097, 47 U. S. C. 409(l), provides in pertinent part:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act * * * on the ground or for the reason that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 501 of the Communications Act of 1934, 48 Stat. 1064, 1100, as amended, 68 Stat. 30, 47 U. S. C. 501, provides in pertinent part:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done,

or willfully and knowingly cause or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year or both; * * *.

Federal Rules of Criminal Procedure involved:

Rule 1 of F. R. Crim. P. provides:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 2 of F. R. Crim. P. provides:

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7 of F. R. Crim. P. provides:

Rule 7. Indictment and the Information.

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

Rule 32 of F. R. Crim. P. provides:

Rule 32. Sentence and Judgment.

(a) Sentence.

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

• • •

Rule 42 of F. R. Crim. P. provides:

Rule 42. Criminal Contempt.

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judges and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is

entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

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2 Swift, *Digest of the Laws of Connecticut* (1823) 56
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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 6

AL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 72-77) is reported at 334 F.2d 460.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1964 (R. 77). Petitions for rehearing were denied on August 25 and 26, 1964 (R. 78-80). The petition for a writ of certiorari was filed on

September 22, 1964, and granted on December 14, 1964 (R. 82). 379 U.S. 944. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Brown* v. *United States*, 359 U.S. 41, which authorized the procedure employed in the instant case, should be reconsidered and overruled.

2. Whether petitioner was constitutionally entitled to a jury trial on the charge that he was in contempt for refusing to testify after being directed by the court to do so.

3. Whether it was constitutionally permissible for the district court to sentence petitioner to imprisonment for one year.

RULE INVOLVED

Rule 42, F.R.Crim.P. provides:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judges and entered of record.
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt

charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

On July 31, 1963, petitioner, pursuant to a grand jury subpoena, appeared and was sworn as a witness before a grand jury sitting in the Southern District of New York (R. 65; see R. 47). The Assistant United States Attorney in charge of the proceeding advised petitioner that the grand jury was investigating alleged violations of the Federal Communications Act (47 U.S.C. 203(c) and 501) and 18 U.S.C. 1952, and that he had a constitutional right to refuse to answer any question which he believed might incriminate him (R. 65). Petitioner then declined to answer five questions on grounds of possible self-incrimination and said that he wished to obtain counsel (R. 65-67). During the proceedings, government counsel advised petitioner that inasmuch as the inquiry concerned possible violations of the Communications Act he would obtain immunity from pros-

ecution by the terms of that Act and therefore could not rely upon the claim of privilege (R. 65-66).

On August 1, 1963, the Assistant United States Attorney, petitioner and his attorney appeared before Judge McLean. The court said that the proceeding was not a "contempt hearing" and, that the question before the court was whether the petitioner would have an immunity from prosecution, by virtue of the Communications Act, which would be broad enough "to protect him against any possible prosecution for any testimony that he may give" (R. 45-46). Because the subpoena served on petitioner did not refer to the Communications Act, the court expressed some doubt as to whether petitioner would necessarily obtain the immunity which was intended and therefore declined to direct petitioner to answer the particular questions there involved (R. 57). The court said that the grand jury subpoena should contain reference to an investigation of violations of the Communications Act, and that the particular questions to be propounded should involve use of the telephone (R. 57). It noted that if the government would thus lay a proper foundation, petitioner's counsel would have an opportunity to raise the question whether the immunity applied in view of the fact that some other statute was also under investigation, saying that this was "the only poin. it saw in the case (R. 58).

On August 7, 1963, petitioner reappeared before the grand jury pursuant to a subpoena to appear and "give testimony in regard to alleged violations of Sections #501 and #203-C of Title #47, United States Code" (R. 17; see R. 73). Government coun-

sel advised petitioner of his constitutional privilege. When petitioner pleaded the privilege to one question, government counsel advised that the inquiry concerned possible violations of Sections 203(c) and 501 of the Communications Act, and that upon direction by the grand jury to answer the questions petitioner would be given immunity under Section 409(*l*) of that Act for his testimony (R. 17-18). Petitioner said that he understood (R. 17-18). Thereafter, however, petitioner refused on grounds of possible self-incrimination, to answer a number of questions about an interstate telephone call (R. 18-21).

The grand jury and government counsel promptly appeared before Judge McLean (R. 3-4). Government counsel stated that the grand jury was seeking assistance from the court "in a matter involving a violation of the Federal Communications Act," in that petitioner had refused to answer the questions propounded "[e]ven though he was informed that the grand jury was granting him immunity under 409 (*l*)" (R. 4). Pursuant to the court's direction, petitioner and his attorney appeared in the court room (R. 4). The transcript of the grand jury proceedings was read, and argument was heard regarding the propriety of granting immunity in the circumstances (R. 8-15). The court, desiring to give "further thought on the matter," adjourned the proceedings until the following day (R. 16).

On August 8, 1963, Judge McLean and all parties appeared, together with the grand jury, in the courtroom used as a grand jury room. Judge McLean

stated that he was satisfied that petitioner would receive complete immunity from prosecution for his testimony and directed petitioner to answer the questions propounded before the grand jury (R. 24). After the judge and petitioner's attorney left the room (R. 24), government counsel propounded to petitioner the same questions which petitioner had refused to answer the previous day (R. 26-29). Petitioner again refused to answer on the ground of possible self-incrimination (R. 26-29).

Shortly thereafter, petitioner and his attorney, government counsel and the grand jury again appeared before Judge McLean. The court was "opened by proclamation" (R. 60). The grand jury stenographer was sworn as a witness and read her notes of the proceedings before the grand jury earlier that morning (R. 25-29). After reiterating the government's position on the grant of immunity, government counsel requested the court "to direct this witness once again to answer the questions that were put to him" (R. 29-30). Petitioner's counsel said he was "not going to repeat the argument of yesterday" with one exception, which was that the grand jury had no authority to offer anyone immunity because immunity came from the statute (R. 30).

After petitioner was sworn as a witness, the court propounded the same questions which petitioner had refused to answer before the grand jury and directed that he answer each question (R. 30-32). Petitioner persisted in his refusal to respond (R. 30-32). At the conclusion of the questioning, the court said, "Does anybody want to say anything further?" (R.

32). Government counsel requested the court to remind petitioner that he had been granted immunity under the statute (R. 32). The following proceedings transpired (R. 32-33):

> THE COURT: I have already made my position perfectly clear, but I will say it again:
>
> I have directed you to answer these questions before the grand jury, and I have directed you to answer them here. It is my ruling that you cannot be prosecuted for any answer that you give under the circumstances of this case.
>
> Do you still refuse Mr. Harris?
>
> THE WITNESS: I respectfully refuse to answer on the grounds it would tend to incriminate me.
>
> THE COURT: Anything further?
>
> MR. MALONEY: No, your Honor. I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.
>
> MR. POLAKOFF: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.
>
> I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that

there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

THE COURT: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

MR. POLAKOFF: Or a hearing on contempt open to the public?

THE COURT: This is open to the public.

MR. POLAKOFF: This room has been sealed.

THE COURT: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that I agree with him, but I understand that what he is doing is taking a position so that he can

> raise a question on appeal. And he has a legal right to preserve his position and raise that question.
>
> I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

After fixing bail pending appeal, the court announced that it would be "glad to consider a reduction of sentence" if petitioner so moved after having testified before the grand jury (R. 36). Petitioner was released on bond shortly thereafter (R. 38). On August 9, 1963, the court entered judgment and filed the requisite certificate under Rule 42(a), F.R.Crim. P. (R. 38, 39-42). On July 22, 1964, the court of appeals affirmed the conviction (R. 72-77). 334 F.2d 460. This Court granted the petition for a writ of certiorari, limited to the following questions: the propriety of the Rule 42(a) procedure employed; whether petitioner should have been granted a jury trial; and whether the sentence imposed was constitutionally permissible (R. 82). 379 U.S. 944.

SUMMARY OF ARGUMENT

I

Having refused, in the court's presence, to comply with a specific directive that he testify, petitioner could be punished for contempt in the summary manner prescribed by Rule 42(a) of the Federal Rules of Criminal Procedure. This Court so held in *Brown* v. *United States*, 359 U.S. 41, and there is no occasion to overrule that decision. The procedure whereby a re-

calcitrant witness is summoned to appear before the grand jury in the presence of the court and is given a final opportunity to comply with an order to testify is well established. Since most issues of fact or law have been fully aired by that juncture, a witness who persists in refusing to testify may then be summarily punished for his violation of the court's mandate. Although the witness may also have been in contempt when, in the judge's absence, he refused to answer the grand jury's questions after the court had directed him to do so—and this contempt could be punished pursuant to a Rule 42(b) proceeding—the fact that the contempt was repeated in the court's presence warrants the summary procedure provided in subsection (a).

Petitioner's counsel never suggested that there was any evidence he could present in extenuation nor did he seek an enlargement of time so as to offer data regarding the sentencing practices of other courts in similar cases. Indeed, counsel offered no defense other than the legal one which had been argued on petitioner's two prior appearances before the court. Consequently, a formal hearing on notice, such as is provided by Rule 42(b), was unnecessary. Civil contempt would have been an inadequate remedy in these circumstances because service of any civil imprisonment would doubtless have been stayed pending final disposition of petitioner's legal contention. This might have meant that petitioner would avoid the court's order altogether since the grand jury's term was scheduled to expire in February 1965, and appellate proceedings would not be concluded by that time.

II

Petitioner was not constitutionally entitled to a jury trial. In our view, both the *dictum* in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12—suggesting that an alleged contemnor may not be given a sentence exceeding the permissible limit for petty offenses—and Mr. Justice Goldberg's dissenting view in *Barnett*—that serious contempts may not be tried without a jury—rest upon erroneous premises. There is no historical basis for the assumption that the Constitutional draftsmen believed criminal contempt to be "a species of petty offense punishable by trivial penalties" (376 U.S. at 752 (Goldberg, J., dissenting)) or for the corollary proposition that criminal contempts were tried without juries in colonial days because the permissible punishments did not exceed the limits of the petty-offense jurisdiction. Blackstone's *Commentaries*, which was the authoritative exposition of the common law for judges and attorneys at the time of the adoption of the Constitution, explicitly treated contempts separately from petty offenses. Blackstone's justification for summary proceedings in contempt cases differed substantially from the stated reasons underlying summary proceedings for "disorderly offences."

The colonial and early State statutes rebut any assertion that a general limitation was imposed on the permissible punishment for criminal contempt. Certain kinds of contempt such as breaches of courtroom decorum or failure of jurors or witnesses to respond to summonses carried explicit statutory pen-

alties. But we have found no limitation whatever, in any colonial act, on the power of a court to punish for disobedience of its order, and the only two statutes covering such a situation apparently authorize indefinite imprisonment. While most contempt cases concerned petty infractions which were punished with trivial penalties, occasional serious contempts subjected violators to heavy fine or substantial imprisonment.

Particularly enlightening are the early statutes setting the limits of petty offense jurisdiction. If these limits are compared with punishments authorized or actually imposed for criminal contempt, it becomes clear that it was never suggested to the colonists that there was any relation between contempt (other than courtroom misbehavior) and the class of petty offenses traditionally triable without a jury. The fact that long imprisonment was not a common punishment for any kind of crime in colonial days must also be considered in evaluating the sentences imposed at that time for criminal contempt.

Alternatively, we submit that a trial by jury is not required if (1) the contempt is committed in the presence of the court or (2) no issue of fact is raised with regard to a contempt committed in the court's presence or (3) the "criminal" sentence imposed is patently designed to coerce compliance with a court order which is outstanding at the time of sentencing and has not yet been obeyed.

ARGUMENT

I

The Court Properly Used the Summary Procedure Provided By Rule 42(a) In Holding Petitioner In Contempt for His Refusal To Answer Questions Asked By the Grand Jury

Petitioner's initial contention is that it was unconstitutional or otherwise impermissible for the district court to utilize the summary procedure authorized by F.R. Crim. P. 42(a) instead of the more elaborate procedures prescribed in subsection (b) of that Rule (pp. 2-3, *supra*). Petitioner acknowledges that the same argument made here was rejected by this Court in *Brown* v. *United States*, 359 U.S. 41 (which was reaffirmed in *Levine* v. *United States*, 362 U.S. 610), but he urges that *Brown* be overruled. *Brown*, we submit, was correct when decided and remains so today. The issues presented by contempts of the sort involved here and in *Brown* are inappropriate for the plenary proceedings contemplated by Rule 42(b). Moreover, if compliance with court orders regarding grand jury testimony could only be obtained at the expense of cumbersome full-dress trials, the grand jury's investigatory power might be impaired.

A. *Rule 42(a) authorizes summary contempt proceedings for recalcitrant grand jury witnesses who refuse, in the presence of the court, to answer questions.*

A literal reading of Rule 42(a) obviously brings within its reach contempt of the sort involved here. The Rule authorizes summary disposition of con-

tempts "committed in the actual presence of the court" whenever the judge "certifies that he saw or heard the conduct constituting the contempt." These conditions will usually be met in situations involving recalcitrant grand jury witnesses. Grand juries do not possess either express or implied power to compel the attendance or testimony of witnesses, nor do they have the authority to rule definitively upon claims of privilege or the application of immunity statutes. For these matters, grand juries turn to the courts to which they are attached for the necessary assistance in order properly to discharge their duties. *E.g.*, *Wilson* v. *United States*, 221 U.S. 361; *Hale* v. *Henkel*, 201 U.S. 43. As this Court recognized in *Brown* (359 U.S. at 49):

> A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnessess. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

When a grand jury's inquiry is halted by a witness' claim of his constitutional privilege against self-incrimination, the usual procedure is to bring the witness before the court so that a ruling may be made as to the applicability of the claim of privilege in light of the questions asked or the existence of an immunity statute. *E.g.*, *Hoffman* v. *United States*, 341 U.S. 479; *Blau* v. *United States*, 340 U.S. 159; *Rogers* v.

United States, 340 U.S. 367. This is the meaningful hearing in the case—the time when the legal or factual issues are presented and argued. When these questions are resolved, the court directs the next step, if any, to be taken by the grand jury or the witness. If the witness has a valid position, he will be sustained by the court in his refusal to answer, as petitioner in this case was under the first subpoena. If the court regards the claim as invalid—as the court did here with respect to the second subpoena—the witness then knows that a refusal to answer constitutes disobedience of a court order which may carry contempt sanctions.

Ordinarily, the witness who is directed to testify returns before grand jury and is again interrogated. A refusal to testify then renders him "for the first time guilty of contempt." 359 U.S. at 50. But there is every reason thereafter to bring the witness before the court again, and to have the questions repeated so that he may be given a last opportunity to purge himself before being held in contempt. The solemnity of the proceeding as well as the presence of the judge —who represents the enforcing power—may induce a theretofore recalcitrant witness belatedly to answer the questions posed by government counsel and the grand jury. If the witness responds to persuasion at this stage not only will he have purged himself of his eariler contempt, but the grand jury inquiry might then continue without an extended interruption. It has long been held to be the preferable procedure, when a witness refuses to give testimony in the grand jury room, "that the jury themselves should go into

court with the officer and the witness, that the questions may be stated, or the decision of the court made, in the presence both of the jury and the witness." *Heard* v. *Pierce*, 62 Mass. 338, 345. See *United States* v. *Dachis*, 36 F. 2d 601 (S.D. N.Y.); *United States* v. *Hill*, 1 Brock. (Fed. Cas.) 156, 160 (per Chief Justice Marshall); *In re Belle Harris*, 4 Utah 5, 8-9; *Commonwealth* v. *Bannon*, 97 Mass. 214, 219. Affording a witness a last opportunity to comply with the court's order is also in keeping with this Court's suggestion in *Yates* v. *United States*, 355 U.S. 66, 75, that a court should "only make use of the more drastic criminal sanctions when the disobedience continues," [1] and it was even approved by the dissenters in the *Brown* case as a permissible form of "additional persuasion." 359 U.S. at 54.

If the witness refuses—in effect, for the third time—to answer the questions in the court's presence, it is appropriate for the court to treat that refusal as the critical one for contempt purposes. The witness is not being subjected to any unfair or precipitous action. The hearing held after his first refusal was one in which he could have raised nearly all material issues of fact or law. Indeed, it is extremely unlikely that there will be any issues of fact involved in such a case; ordinarily the only question is a legal one—whether the witness may be compelled to testify. Under the procedure outlined above, the witness is

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[1] Civil contempt—the "coercive remedies" which the Court referred to in *Yates*—is an impractical alternative for the reasons stated at pp. 21-23, *infra*.

given two opportunities to argue that question before the district court—once before the court rules and again after his subsequent refusal in the grand jury room.

The record in this case makes it abundantly clear that the only real issue was whether petitioner had immunity under the Communications Act. That question was the subject of argument as early as August 1, 1963, when the district judge declined to direct petitioner to answer questions put to him because he was not satisfied that, under the subpoena served on petitioner, immunity would necessarily follow from the testimony. In the discussion of that date, the *Brown* case was called to counsel's attention (R. 57), and counsel subsequently stated that he had studied it (R. 5). On August 7, petitioner's attorney noted that the case "probably will involve contempt" (R. 5). In these circumstances, petitioner and his counsel obviously knew that an adjudication for contempt would follow if petitioner persisted in a refusal to answer after the district court ruled that the immunity statute did apply.

Although petitioner and his counsel knew on August 8 that the judge's reading of the questions was, under the *Brown* procedure, the foundation for a summary contempt adjudication, counsel merely stated then that he was "not going to repeat the argument of yesterday" with respect to the immunity statute, with one exception. He was specifically asked after the questions were propounded if he had anything further, and he offered nothing (R. 30, 32). Neither then nor later, when petitioner's counsel sought an ad-

journment if there was to be an adjudication of contempt, was there any suggestion that petitioner wished to assert any issue other than the scope of the immunity statute. Counsel did seek permission to call witnesses, but this was, according to his own statement, in order "to prove to your Honor that there could be no possible violation of the Communications Act" (R. 33). Counsel was not, therefore, suggesting that he had anything to offer in explanation of the refusal to answer or in mitigation of any possible sentence; he was merely trying, at this late stage, to reargue the point which had been fully aired on August 1 and again on August 7 and 8 before the court asked the questions and demanded answers. Therefore, the district court was clearly correct in its view that petitioner was "taking a position so that he can raise a question on appeal" and that there was "no reason for any further hearing" (R. 33).

The only consequence of proceeding under subsection (b) and charging petitioner with contempt for his refusal to testify when he first returned to the grand jury room (out of the presence of the court) would have been further delay. It was in the interest of the orderly administration of justice to have the matter of petitioner's asserted privilege—the only issue suggested by him—settled authoritatively as soon as possible. That question could be decided by appellate courts only after the entry of a final judgment. If the court had proceeded under subsection (b) to try petitioner for the out-of-court contempt, it would have delayed resolution of the single issue on

which its judgment turned, with no consequential benefit.

As the court of appeals observed in *United States* v. *Brown* (247 F. 2d 332, 338 (C.A. 2)):

> There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, mutiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary.

Since the district judge had "personal knowledge * * * acquired by his own observation of the contemptuous conduct" (*In re Oliver*, 333 U.S. 257, 275) of August 8, he could proceed under subsection (a) to pass judgment on petitoner's conduct on that occasion. "The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." *Ex parte Terry*, 128 U.S. 289, 312. Assuming, as we do, that the court could have chosen to proceed under subsection (b) with regard to petitioner's out-of-court contempt it selected a permissible alternative course in punishing instead for the contempt committed in its presence so as to avoid further purposeless delay.

B. ***In the circumstances of the present case, neither the procedure provided by Rule 42(b) nor civil contempt would have been appropriate.***

The dissenting Justices in the *Brown* case were of the view that the notice and hearing procedure provided by Rule 42(b) should be used in order to permit the witness "to present evidence in extenuation and to show what other courts had done in similar circumstances." 359 U.S. at 57. It was also suggested that the added time was needed to afford the judge "an opportunity for reflection." *Ibid.* Assuming, *arguendo*, that a district judge would be required to conduct plenary proceedings under Rule 42(b) if a recalcitrant grand jury witness proposed to call witnesses "to present evidence in extenuation," if his counsel expressed an intention to canvass prior cases to demonstrate "what other courts had done in similar circumstances," or if the events leading up to the alleged contempt had happened so quickly that the judge had no time for reflection, none of these were realistic possibilities here. Petitioner's counsel was well aware that a contempt hearing might be held as early as August 1 (R. 45). On no occasion did he suggest that he might wish to offer evidence in extenuation; all that he ever proposed was to call witnesses "to prove * * * that there could be no possible violation of the Communications Act" (R. 33). This offer of proof related solely to the one legal issue on which petitioner rested his entire defense. It was properly rejected by the court since evidence regarding the grand jurors' state of mind or the facts underlying the telephone calls about which the grand jury

had inquired could not affect the lawfulness of the grant of immunity. Having read the *Brown* decision, petitioner's counsel knew that punishment could be imposed summarily under existing law. But he did not suggest any basis for mitigating petitioner's sentence, nor—despite the extensive discussion of sentencing in the dissenting opinion in *Brown* (359 U.S. at 57-60 and notes 11-13)—did counsel propose to the court that it defer the imposition of punishment until he could survey what other courts had done in similar circumstances. Indeed, the trial judge himself was acquainted with *Brown* (R. 57) and could personally have compared the sentence he intended to impose with those enumerated in the dissenting opinion. See 359 U.S. at 58-59, note 11.

Nor would civil contempt have been appropriate on these facts. The court was of the view that a substantial question existed regarding the application of the immunity provision, and that this question should be settled by an appellate court (R. 35). It would have been unfair to petitioner to keep him in jail while that issue was being determined by the court of appeals and by this Court. On the other hand, the grand jury's term was due to expire in February 1965. Petitioner's counsel had expressed an intention to pursue the matter "not only to the Court of Appeals but, perhaps, the Supreme Court of the United States" (R. 5). Consequently, if a civil contempt decree were stayed until the immunity issue was finally disposed of, petitioner might escape all punishment notwithstanding the rejection of his legal claim. Since the grand jury investigating the

offense would no longer be in existence when the case finally terminated, it would then be impossible to enforce the obligation to testify.

The trial judge adopted a reasonable alternative in sentencing petitioner to serve one year and suggesting that he would "consider a reduction of sentence" if petitioner testified (R. 36). Had petitioner been immediately incarcerated under a civil contempt decree (with no stay pending appeal), he might have served till the expiration of the grand jury's term—a period of approximately 18 months. See, *e.g.*, *United States* v. *Coplon*, 339 F. 2d 192, 193 (C.A. 6); *United States* v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931. The criminal penalty was shorter in duration and it permitted service of the sentence to await final disposition of petitioner's claim that immunity was improperly conferred.[2] This

[2] There was no danger of secrecy of the proceedings in the course adopted here. It is true that the courtroom had been closed previously "because the grand jury was in session"; and that the judge and petitioner's counsel left the courtroom when the questions were propounded to petitioner before the grand jury. However, when the matter was brought before the judge later that morning, the record shows that, before the questions were propounded, the "Court meets and is opened by proclamation" (R. 60). Thus, petitioner's complaint (Br. 12 and n. 7) that the public "would not know when [the court room] was to be opened after it had been sealed" is without foundation in fact. No one interested in following the case would have had any difficulty in knowing when he could enter. In this case, unlike the situation in *Levine* v. *United States*, 362 U.S. 610, the entire contempt before the court, including the argument that preceded the questioning, and the questioning itself, as well as the adjudication of contempt, was open.

contrast between the term of imprisonment that might have resulted had this been treated as civil contempt and the sentence actually imposed demonstrates that, contrary to the fears expressed in the dissenting opinion in *Brown*, there is no reason to believe that sentences would be harsher in Rule 42(a) proceedings than in civil contempt or after Rule 42(b) proceedings. The reported decisions since *Brown* illustrate this point. In *United States* v. *Levine*, 267 F. 2d 335 (C.A. 2), affirmed, 362 U.S. 610, and in *United States* v. *Rinieri*, 308 F. 2d 24 (C.A. 2), certiorari denied, 371 U.S. 935, the Rule 42(a) procedure was used. In *Levine* a one-year sentence was imposed, and it was reduced to six months by the court of appeals. 288 F. 2d 272. In *Rinieri*, the district court imposed a six-month sentence. In *United States* v. *Castaldi*, 338 F. 2d 883 (C.A. 2), No. 33, this Term, and in *United States* v. *Shillitani*, 345 F. 2d 290 (C.A. 2), No. 412, this Term, on the other hand, the court imposed two-year sentences after Rule 42(b) hearings. Punishment is more apt to depend on two factors—the degree of contumaciousness and the time incarceration would be possible for civil contempt—than on whether the known deliberate refusal to answer is the subject of the hearing under Rule 42(b) or summary adjudication under Rule 42(a).

II

Petitioner Was Not Deprived of Any Constitutional Right By Being Sentenced To a One-Year Prison Term After a Summary Trial Without a Jury

This Court's majority opinion in *United States* v. *Barnett*, 376 U.S. 681, included the following dictum: "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695, n. 12. Since 18 U.S.C. 1(3) defines "petty offense" as any misdemeanor carrying a penalty of imprisonment for not more than six months and/or a fine of not more than $500, petitioner contends that, under the *Barnett dictum*, it was impermissible for him to be sentenced to one year's imprisonment without having been afforded a jury trial. We discuss below four alternative reasons for rejecting petitioner's claim. Our fundamental position is that the *dictum* in *Barnett* rests upon erroneous premises, and that a jury trial is not constitutionally required for *any* criminal contempt proceeding, no matter what sentence may be imposed. Secondly, we argue that even if a trial by jury were held to be required for contempts committed out of the presence of the court (which can only be prosecuted under Rule 42(b)), different considerations apply when the contempt is actually witnessed by the court. Thirdly, we submit that, in any event, there is no constitutional compulsion for a jury trial when, as here, an alleged contemnor raises

no issue of fact whatever in defense of a contempt committed in the presence of the court. Finally, we suggest that when, as here, it is clear that the court has imposed "criminal" punishment primarily as a form of "coercive remedy" rather than a penalty for the contemnor's commission of some past misdeed, the constitutional provisions for juries in "the trial of all crimes" or "in all criminal prosecutions" are inapplicable. Although we present these various alternatives, we particularly urge that the first proposition is firmly and soundly rooted in our constitutional history and that there is no occasion to go beyond it.

A. *The Constitution does not require a jury trial in any criminal contempt proceeding, no matter how severe the sentence.*

In *United States* v. *Barnett*, 376 U.S. 681, this Court adhered to its holding—made six years previously in *Green* v. *United States*, 356 U.S. 165, and in a host of earlier decisions extensively reviewed in *Green*—"that criminal contempts are not subject to jury trial as a matter of constitutional right." 356 U.S. at 183, quoted at 376 U.S. at 692. We will not repeat here the arguments made in support of that rule in our briefs in *Green*, No. 100, O.T. 1957, pp. 63-76, and in *Barnett*, No. 107, O.T. 1963, pp. 44-55, but we respectfully refer the Court to those briefs for a discussion of that question. While petitioner does appear to suggest that *Green* and *Barnett* might be re-examined (Brief, p. 12-13), we understand the principal issue in this case to be whether—granting that jury trial is not constitutionally compelled for

contempts carrying "trivial" punishments (*i.e.*, imprisonment for six months or less or fines not exceeding $500)—Article III or the Sixth Amendment requires that a jury be afforded if the sentence to be imposed exceeds the limit prescribed for "petty" offenses. We submit that the suggestion to that effect in footnote 12 of the *Barnett* opinion is supported neither by the relevant constitutional history nor by sound policies pertaining to the administration of justice.

At the outset, it is important to articulate the premises upon which the *Barnett dictum* rests. *First*, the holding in the *Barnett* case clearly reaffirms the established principle that contempt prosecutions are not ordinarily subject to the constitutional jury-trial guarantees. *Second*, the decision in that case also demonstrates that the seriousness of the contempt alleged is irrelevant to the question whether a jury trial must constitutionally be afforded. Mr. Justice Goldberg noted in dissent that the contempt charged in *Barnett* was "among the most serious in this Nation's history" (376 U.S. at 758). Apparently responding to this observation, the majority opinion stated that "not one federal case has been found to support the theory that courts, in the exercise of their summary contempt powers, were limited to trivial offenses" (376 U.S. at 693), and that "at least 50 cases of this Court * * * support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense" (376 U.S. at 694). In addition, the limitation on the severity of the sentence suggested by the *dictum* would apply,

it is said, "without regard to the seriousness of the offense." *Third*, in proposing to limit the permissible sentence in nonjury contempts to "that penalty provided for petty offenses," the *dictum* apparently distinguishes among contempts, for constitutional purposes, only according to the severity of the sentence imposed. In other words, a contempt case in which a judge wishes to impose a sentence in excess of six months is, under this view, a "criminal prosecution" within the meaning of the Sixth Amendment, and the conduct with which the accused is charged is a "crime" within the meaning of Article III. If, for the same conduct, however, the judge believes that a lesser sentence or a minimal fine is appropriate, he may proceed without a jury—presumably because the trial is not then a "criminal prosecution" in the constitutional sense. Since there is no statutory maximum sentence for contempt, the constitutional right to a jury trial must turn not on the sentence which *might* lawfully be imposed but on the sentence which the judge *actually* pronounces.[3] If he conducts a nonjury proceeding he may not constitutionally impose more than "the penalty provided for petty offenses." If he impanels a jury and the accused is found guilty, he may assess more severe punishment.

1. *History* — The relevant constitutional history does not, in our view, support either the assumption underlying the *Barnett dictum*—that a sentence exceeding that provided for petty offenses may not con-

[3] Compare Mr. Justice Goldberg's view in dissent. 376 U.S. at 759, n. 48.

stitutionally be imposed without a jury trial—or the conclusion stated in Mr. Justice Goldberg's dissenting opinion—that a serious contempt (which would warrant severe punishment) may not constitutionally be tried without a jury. The historical inquiry must begin, we believe, with an examination of the leading common law commentators. At the heart of the issue is the meaning given the words "crimes" and "criminal prosecutions" by the framers of Article III, Section 2, and the Sixth Amendment. In construing the same terms in *Schick* v. *United States*, 195 U.S. 65, 69, this Court said:

> Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it.

In *Schick*, this Court read "crimes" and "criminal prosecutions," in light of Blackstone's definitions, "to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." 195 U.S. at 70. Blackstone's discussion of contempt leaves little room for doubt that, like petty offenses, the offense which we now call contempt was "[a]t the time of the adoption of the Constitution * * * tried summarily without a jury" (*District of Columbia* v. *Clawans*, 300 U.S. 617, 624), irrespective of the severity of the sentence or the gravity of the offense. Hence contempt prosecutions, like the trials of petty offenses,

were not within the scope of what the Constitutional framers viewed as jury-trial cases, and were not, therefore, considered "crimes" or "criminal prosecution" for purposes of Article III or the Sixth Amendment.

In Volume Four of his *Commentaries*—the volume dealing with "Public Wrongs"—Blackstone discusses contempt in his enumeration of substantive offenses (pp. 121-126), and again in the section dealing with summary proceedings (pp. 283-288). He includes in the category of "contempts and high misdemeanors" such varied offenses as embezzling public money (*id.* at 121-122), "giving out scandalous stories concerning [the King]" (*id.* at 123), refusing to take the oath prescribed for public office (*id.* at 123-124), fighting in the King's palace or courts of justice (*id.* at 124-125), rescuing a prisoner from the courts (*id.* at 125), or dissuading witnesses from giving evidence (*id.* at 126). Included in Blackstone's list of "contempts against the King's prerogative"—a subcategory within "contempts and misdemeanors"—are refusing to serve in the King's army, taking a pension from a foreign prince and "disobeying the King's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council * * *" (*id.* at 122). The punishment for most of the "contempts" enumerated in this section is stated as "discretionary fine and imprisonment," although Blackstone mentions that, in some instances, "the pillory or other infamous corporal punishment" (*id.* at 123) or "death" (*id.* at 124) or "loss of the offender's right hand" (*id.* at 125) are

possible. Speaking of the offense "of threatening or reproachful words to any judge sitting in the courts," Blackstone states that offenders "have been punished with large fines, imprisonment, and corporal punishment" (*id.* at 126).

In the chapter devoted to "summary convictions"—defined as proceedings in which "there is no intervention of a jury" (*id.* at 280)—Blackstone relates "the method, immemorially used by the superior courts of justice, of punishing contempts by attachment * * *" (*id.* at 283). He then lists the persons who may be subject to contempt sanctions pursuant to attachment. Included are inferior judges who disobey "the King's writs issuing out of the superior courts" (*id.* at 284), jurors and witnesses who do not appear when summoned (*ibid.*), parties to a suit who disobey "any rule or order, made in the progress of a cause" (*id.* at 284-285), and, finally, "any other persons under the degree of a peer" who engage in "rude and contumelious behavior" or in a "breach of the peace or any wilful disturbance whatever" in the presence of the court, or who, in the absence of the court, disobey or treat "with disrespect the King's writ," speak or write "contemptuously of the court, or judges, acting in their judicial capacity," or who otherwise engage in conduct "that demonstrates a gross want of that regard and respect" which is necessary to maintain the authority of courts of justice (*id.* at 285-286).

With regard to procedure and punishment, Blackstone notes (*id.* at 286):

> If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination.

In the case of contempts committed out of the presence of the court, the alleged contemnor is brought into court on an order to show cause or by attachment, and is required to answer to the charge. The outcome of the proceeding is described as follows (*id.* at 287):

> If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, *and sometimes by a corporal or infamous punishment.* [Emphasis added.]

Blackstone's discussion makes it entirely clear that contempt cases were tried summarily before and during the time when the constitution was drafted and adopted. It also establishes that this was not because (in Mr. Justice Goldberg's words) "the penalties then authorized and imposed for criminal contempts were generally minor; and the courts were authorized to impose minor criminal penalties without a trial by jury for a variety of trivial offenses including, but not limited to, criminal contempts." 376 U.S. at 740. Blackstone's references to imprisonment "at the discretion of the judges" and to "corporal or infamous punishment" for contempt are irreconcilable with any such claim. Moreover, Black-

stone treats summary proceedings for contempt as totally distinguishable from another category of summary proceedings—those tried before justices of the peace "in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences * * *" (4 Blackstone, *Commentaries* 281). If the explanation suggested in Mr. Justice Goldberg's dissent were, in fact, the basis for the jury-trial exception for criminal contempt, contempt would have been included in Blackstone's category of "disorderly offences" carrying trivial penalties. Blackstone's actual explanation for the summary proceeding in contempt cases has nothing to do with the gravity of the offense or the severity of the sentence; he states that the power to punish for contempt is an inherent power of the courts which "must be an inseparable attendant upon every superior tribunal" (*id.* at 286).[4]

Blackstone's analysis is completely consistent with that of other commentators of his age and earlier periods. Bacon, for example, defined attachment as "a process that issues at the discretion of the judges

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[4] Blackstone's reasoning was approved and adopted by this Court in *United States* v. *Hudson*, 7 Cranch 31, 34:

> Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute * * *.

of a court of record, against a person for some contempt, for which he is to be committed, and may be awarded by them upon a bare suggestion * * *" 1 Bacon, *A New Abridgment of the Law* 180 (2d ed. 1762). Bacon's discussion of the cases in which attachment is appropriate makes it clear that he considered it a form of criminal sanction, not merely a method of coercing future compliance with court orders (*id.* at 182):

> Attachments have been granted for speaking contemptuous words concerning the rules of the court, and that in the first instance, without any rule made on the party to show cause why such attachments should not be granted; for it would be vain to serve him with a second rule, who had despised the first. [Capitalization modernized.]

And a further statement demonstrates that Bacon viewed attachment—*i.e.*, summary proceedings—as the proper way to punish a violation of a court order (*ibid.*):

> An attachment is the proper remedy for disobedience of the rules of court; as those made in ejectment, arbitrament, etc. So where a defendant in account, being adjudged to account before auditors, refuses to do it, unless they will allow matter disallowed by the court before; or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. [Capitalization modernized.]

See also 1 Sheppard, *A Grand Abridgment of the Common and Statute Law of England* (1675), p. 427 ("as [contempt] is sometimes a greater and

sometimes a lesser offence; so it is sometimes punished with a greater and sometimes with a lesser punishment, sometimes, by Fine, and sometimes by Fine and Imprisonment together"); 1 Hawkins, *Pleas of the Crown* (7th ed. 1795), pp. 146-148; 4 *id.*, pp. 272-294. See also Fox, *The History of Contempt of Court* (1927), p. 200.

Included in Thomas Jefferson's library was Charles Viner's 23-volume treatise, *A General Abridgment of Law and Equity* (1742-1753). Contempt was defined therein as follows (5 *id.* at 442):

> A contempt is a disobedience to the court, or an opposing or despising the authority, justice or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded by the process, order, or decree of the court. Sometimes it arises by one or more, their opposing or disturbing the execution or service of the process of the court, or using force to the party that serves it. Sometimes by using words imparting scorn, reproach or diminution of the court, its process, orders, officers or ministers, upon executing or serving such process or orders. * * * [Capitalization modernized.]

Viner described the punishment for contempt as imprisonment and specified that "if any one offers any Contempt to the Process, either by Word or Deed, he is subject to Commitment during Pleasure * * *." *Id.* at 447. A distinction is drawn elsewhere in Viner's discussion of punishment for contempt between "any direct and positive contempt," for which "a Party may not only be taken into Custody, but *committed to the Fleet* during the pleasure of the

Court" (emphasis in the original) and "a bare Contempt in not doing somewhat, then only till he obey and perform." *Id.* at 449. See also Gilbert, *The History and Practice of the Court of Common Pleas* (1737), pp. 20-21 ("hence if anyone offers any Contempt to the Process, either by Word or Deed, he is subject to Commitment during Pleasure, *(viz.) a qua non deliberentur sine speciali praecepto Domini Regis* * * *").[5]

In summary, we have found no support whatever in any of the common-law treatise writers for the propositions that contempt was a "species of petty offense" and that a limitation on punishment was believed applicable by English judges.

In addition to what they learned from the text writers, the Constitutional draftsmen relied on their own experiences and the practice developed in colonial courts. In order to provide the Court with a complete picture of what the colonial records show, we have gathered the available original colonial materials in a study directed by Professor Joseph H. Smith of Columbia University. The results of that research are submitted in a separate Appendix.

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[5] Also in the Jefferson Collection was Comyns' 6-volume *Digest of the Laws of England.* The entries regarding contempt and the procedures followed in contempt cases appear under "Attachment" and "Chancery." 1 *id.* (4th ed. 1800), pp. 575-579; 2 *id.*, pp. 209-223. Comyns indicates that in Chancery proceedings, unlike those in common-law courts, the court "examine[d] witnesses on both sides, and then decide[d] upon the truth of the charge" (id. at 214) rather than leaving an alleged contemnor who denied the charge under oath to a perjury prosecution.

The Appendix is large in size because of its scope, and it includes many statutes and judgment entries which bear only slightly upon the issues in this case. But since the underlying records are not readily accessible, we felt it would be undesirable to edit or select from among the materials discovered in the course of the research. Consequently, while we do not believe that the bulk of the minor contempts entered in the common law colonial courts' judgment rolls are of substantial significance in resolving the issues in this case, we have included them all in our Appendix for such use as the Court may wish to make of them. We note also that because of the inadequacy of available chancery court records, we were unable to engage in any systematic survey of contempts of orders entered by those courts. Hence an avenue which might be thought fruitful in determining what remedies the Constitutional framers believed appropriate for violation of court orders was closed to us for practical reasons.

Before descending to particulars, we believe it appropriate to state the general conclusions which emerge from our examination of these original sources. *First*, the overwhelming majority of colonial judicial decisions and statutes concerned trivial contempts which were punished with minor fines. A substantial portion of the cases listed in the Appendix deal with jurors' failure to appear, petty misbehavior in the courtroom or other similar infractions. Grave infractions of the court's authority, as one would expect, were far less common. *Second*, we have found no suggestion whatever, in any decision or commen-

tary of the period, that the right to trial by jury in contempt cases had anything to do with the severity of the sentence or with the seriousness of the alleged offense. *Third*, while there were occasional colonial contempt cases tried to a jury, there is no discernible distinction between the sentences imposed pursuant to jury trials and those imposed after summary proceedings.[6] *Fourth*, we have found no case in the colonial records in which a contempt committed in the presence of the court or in direct disobedience of a court order was tried to a jury. *Fifth*, the cases which were, in the colonial period, tried to a jury were either "sedition"-type cases (or forms of contempt also involving the commission of distinct offenses) or cases involving conduct (other than violations of a court order) committed out of the presence of the court.

When these general conclusions are considered in light of the high value placed on trial by jury by the colonists, it becomes clear, we submit, that the line drawn by the colonists between jury and nonjury trials for contempts had nothing to do with the gravity of the alleged conduct or with the severity of the actual or potential sentence. The fact that it was not even remotely suggested by any counsel or commentator of the period that a jury trial should be afforded for "serious" contempts or "severe" punishments supports that conclusion. We believe that the

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[6] There were, of course, contempts tried to a jury which resulted in severe sentences, but this was more generally attributable to the nature of the offense. "Sedition" cases, such as those arising out of Shay's Rebellion, are prime examples. See Appendix, pp. 146-147.

colonial records indicate that, notwithstanding their adherence to the principle of jury trial for criminal prosecutions, the draftsmen of the Constitution had every intention of preserving the power of courts to punish disobedience of their orders by attachment—the summary nonjury procedure theretofore recognized as inherently within the power of the courts.

a. *The contempt statutes.*—The colonial acts dealing with contempt did, as the Court noted in *Barnett* (376 U.S. at 701), prescribe limitations on punishment which "were quite narrow in scope, being applicable only to a specific contempt * * *." Our research has produced no colonial act limiting the general power to punish contempts or providing any maximum punishment which could be imposed for willful disobedience of an injunction or other specific order.[7] Indeed, the few pre-1800 statutes pertaining to general contempt powers which mention punishment leave it to "the reasonable discretion of the court" (App. 114, 115) or authorize "such fine or corporal punishment as the court shall judge" (App. 186). Justices of Orphans' Courts in Delaware and Pennsylvania were generally authorized to enforce their warrants, sentences or orders "by imprisonment of body or sequestration of lands or goods" (App. 30, 265). The statutes adopted in Georgia and Rhode Island after the enactment of the federal Judiciary Act of 1789 (see pp. 47-48, *infra*) empowered

[7] Maryland and New Jersey statutes relating to the powers of High Courts of Chancery spelled out permissible punishments, but allowed such broad scope as, in effect, to impose no limit at all. See pp. 41, 45, *infra*.

judges in those States to punish contempts by fine or imprisonment at the discretion of the court (App. 51, 294). The general power to "punish contempts" was recognized by a New Hampshire act of 1678, but no restriction on that power was stated (App. 171).

The absence of any statutory limitations on the general contempt power becomes particularly significant when it is considered in light of the fact that the power to punish summarily for disobedience of a court order or other contemptuous conduct was deemed an inherent power of the court. In other words, the punishments imposed by English courts were not based on statutory authority but on the common law and usage. Hence courts were free to continue in the common law tradition so long as no statute explicitly limited their powers in this regard.

In this context, it seems clear that the colonial acts which did impose limitations were only biting off a small portion of the judicial authority to impose criminal-type punishment for what had traditionally been treated as contempt. Mr. Justice Goldberg's statement in his dissenting opinion in the *Barnett* case that "[w]hen the Bill of Rights was ratified, at least five of the original 13 States had specific statutory limitations on the punishment which could be imposed summarily for criminal contempts" (376 U.S. at 741) is mistaken. Connecticut's statutes limited the punishment which might be imposed for disorderly conduct in the courtroom by a defendant (App. 10, 11), for the failure of jurors or witnesses to attend court (App. 12-14), and for failure to as-

sist court officers or to comply with process (App. 15-16). But these laws did not affect the authority of the Connecticut courts to impose more severe punishments for other—more serious—forms of contempt. For example, those who spoke "contemptuously" against the court or against the governor were whipped (App. 23, 24). Indeed, the statutory limit of a 30-shilling fine for courtroom misconduct by a person on trial for delinquency (App. 11) was exceeded in two cases—possibly because the contempt was not in the courtroom or in the course of a "delinquency" trial (App. 24-25, 25-26, paras. 5, 9)—just as the earlier 20-shilling maximum had been exceeded (compare App. 10-11 with App. 24, section B, para. 3).

In Delaware, too, the statutory limit for some kinds of contempt was fixed at 5 pounds, but this did not mean that Delaware "did not permit imprisonment for criminal contempt" (376 U.S. at 741) or that no fine exceeding 5 pounds could be imposed in contempt cases other than those covered by the narrow statutes. Certain kinds of witnesses who failed to appear could, under other Delaware statutes, be fined up to 50 pounds (App. 35), and certain court officers in contempt might be punished with 100-pound fines and 3-year disqualifications from office (App. 36-37).[8]

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[8] We have not found any explicit Delaware statutory limitation on imprisonment nor any case in which a prison sentence was imposed. Prisons in colonial Delaware—what the colonial statute called "workhouses" (see 1 Laws of the State of Delaware, p. 135, ch. 58)—were used primarily for the punishment of "vagabonds, unruly servants, and other idle or dis-

The Maryland statutes squarely contradict Mr. Justice Goldberg's conclusion that the laws of that colony and State authorized holding alleged contemnors in civil contempt "but * * * permitted no punishment 'exceeding ten pounds current money.'" 376 U.S. at 741-742. The very act cited in support of that assertion—Act of November 1785, ch. 72—included the following provision (Section 35) authorizing indefinite imprisonment:

> And be it enacted, That the chancellor shall have full power and authority to commit any person or persons in contempt for not obeying or complying with any rule, order or decree, of the chancellor, to the custody of the messenger, by him to be closely confined in the gaol of Anne Arundel county, or in the gaol of the county of which such person shall be an inhabitant, or where he may be taken * * * until such person or persons respectively be released and discharged by order of the chancellor.

The section relied on and quoted both in the dissenting and majority opinions (Section 23; see 376 U.S.

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orderly persons" (1 Laws of the State of Delaware, p. 346, ch. 146). An offense such as horse-stealing, for example, was punished by requiring restoration of the horse and payment of double value to the owner (or payment of fourfold value if the horse could not be found) and a public whipping, setting in the pillory, and cutting off of the soft part of the offender's ears (2 Laws of the State of Delaware, p. 668, ch. 45). Another illustration is the offense of perjury, which was punished with a 40-pound fine, with the offender suffering imprisonment and one hour in the pillory only if he had no lands, goods or chattels with which to satisfy the fine. 1 Laws of the State of Delaware, p. 75, ch. 22, section 26.

at 707) refers quite clearly, we believe, only to what is now called civil contempt. It begins, "And be it enacted [t]hat in order to enforce obedience to the process, rules and orders, of the chancery court * * *" thus demonstrating that it relates to coercive and prospective remedies, not to punishment for past disobedience. The fine "not exceeding ten pounds current money" which is assessed, is said to be "for the purgation of every such contempt," indicating again that it is not in the nature of a criminal fine. Section 23, in other words, authorizes civil imprisonment and a fine not to exceed ten pounds as a coercive remedy. Criminal punishment under Section 35 of the statute could be far more severe.

Other Maryland statutes support this construction. Under early statutes, violent conduct in the courtroom was punished by corporal correction such as amputation of a hand or burning (App. 60). A witness who refused to testify could be fined 500 pounds of tobacco and, if he failed to pay the fine, he could be imprisoned for two months (App. 64-65). The same penalty attached to persons who refused to serve as constables (App. 67-68). Witnesses who failed to appear or defaulted could be fined up to 1000 pounds of tobacco (App. 65), and the same fine—with the alternative of serving up to four months' imprisonment—applied to those who refused to serve as justice of the peace, sheriff or coroner (presumably upon a court order to do so) or who refused to execute their offices (App. 67-68). A fine of 3000 pounds of tobacco could be imposed on a sheriff who neglected to summon proper jurors (App. 69), and in 1788, the possible

fine for such neglect was increased to 100 pounds current money (App. 69-70)—clearly a most substantial penalty by the standards of the time.

Our survey of the New Hampshire acts reveals that that colony did not limit the criminal punishment for contempt to 10 days' imprisonment or a ten-pound fine—as the dissenting opinion in *Barnett* suggests (376 U.S. at 742). Discretionary punishments were authorized by laws of 1679-80 and 1776 (App. 171-172). Imprisonment up to 6 months was provided for witnesses who refused to appear (App. 173), and up to 12 months (in addition to a fine up to 90 pounds) for anyone obstructing a sheriff's service of process or rescuing a prisoner (App. 175).

The South Carolina acts also demonstrate that imprisonment and fines in excess of 10 pounds were permissible. The very defaulting-witness statute which the majority opinion and Mr. Justice Goldberg quote (376 U.S. at 721, 742; S.C. Public Laws (Grimke ed. 1790) at 129) authorized punishment "according to the order of the common law" whenever the case in which the contemnor failed to testify was a criminal trial for a capital offense (App. 328-329). In addition, 20-pound penalties were imposed for misbehavior in the courtroom (App. 323) and for other defaulting witnesses (App. 327-328). And a 1000-pound forfeiture was prescribed for judges, sheriffs or clerks who failed to call proper jurors (App. 330).

Similar acts in colonies other than the five relied upon by Mr. Justice Goldberg establish that even in the few contempt situations specifically covered by

statute, the penalties varied considerably. In Georgia, jurors who failed to appear in response to a summons could be fined up to three dollars (App. 54, para. 10); witnesses who failed to appear could be summarily fined up to 300 dollars (App. 55). In New Jersey, drunkenness in court was punished with a fine of 3 shillings and 4 pence and a stay in the stocks for not more than 5 hours (App. 187), but a witness' failure to appear might subject him to a fine of 10 or 15 pounds or to a forfeiture of 50 dollars (App. 189-190). A coroner's failure to perform his duties could result in attachment and a fine of 500 dollars (App. 190-191). The New York acts limited the maximum fine to be imposed on a person for refusing or neglecting to serve as a constable (App. 216-217), but they authorized fine or imprisonment at the court's discretion for any resistance to process or execution (App. 218). One-hundred-pound fines could be imposed in North Carolina against defaulting witnesses in criminal cases or sheriffs who violated court orders (App. 242, 245), but inferior court jurors could only be fined 40 shillings for nonappearance (App. 238). And in Virginia, whipping and the pillory were permissible seventeenth-century punishments for those speaking disrespectfully about the court (App. 342-343), whereas jurors or witnesses who failed to appear were fined up to 200 or 1000 pounds of tobacco, respectively (App. 344, 346-347).

The fact that disobedience of an injunction was treated differently from less serious types of contempt is illustrated by New Jersey statutes enacted after the adoption of the Bill of Rights. Any person swearing

or cursing in the presence of a justice of the peace could be summarily fined half a dollar (Act of March 16, 1798, ch. 736 at §§ 8, 9). But the statute establishing the Court of Chancery authorized imprisonment for criminal contempt without any limit of time (Acts of the Twenty-Third General Assembly of New Jersey (1799), ch. 819, § 13):

> *And be it enacted*, That if the person, against whom an injunction shall be issued to stay waste, shall after the service thereof, do or commit, or consent, direct or suffer to be done or committed, any waste or destruction of or upon the premises, contrary to the said injunction, and the chancellor, on affidavit or other proof, shall be of opinion, that such waste or destruction hath been done or committed, then the said chancellor may, on motion, order an attachment of contempt to be issued against the person so charged with disobedience to and a breach of the said injunction; and if the person so offending, shall be brought before the chancellor, by virtue of the said attachment, and shall not make it appear to his satisfaction, that no waste or destruction hath been done or committed as aforesaid, then the said chancellor may, in his discretion, and on motion, order such offender to be committed, and kept in close custody, until he shall give further order therein.

The provision of the same statute relied on by Mr. Justice Goldberg as disclosing an intention to limit the permissible punishment for criminal contempt (376 U.S. at 744) related, we submit, to the coercive or "civil contempt" remedies available to a court. The

quoted section (§ 53) expressly authorizes these sanctions "to enforce obedience to the process, rules and orders of the court of chancery."

Statutes enacted in other jurisdictions after the adoption of the Bill of Rights also failed to limit the punishment which might be imposed by a court for disobedience to its decree. Both the Kentucky and Alabama statutes (376 U.S. at 745-746) excepted from any limitation "cases where a party served with process from any court, judge or justice, shall refuse to perform any decree, judgment or order of the same." Kentucky Act of December 19, 1793, 1 Digest of Kentucky Laws (1834), tit. 48, p. 427; Alabama Act of 1807, Digest of Alabama Laws (1833), p. 88.[9] See generally Tefft, *United States* v. *Barnett*: "*'Twas a Famous Victory*," 1964 Sup. Ct. Rev. 123, 132-133.

In summary, the colonial acts demonstrate that there was no general limitation imposed on a court's criminal contempt powers. In certain kinds of cases, it is true, statutes were adopted to prescribe limits

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[9] The Pennsylvania statute of 1809 cited by Mr. Justice Goldberg did limit the permissible punishment for an out-of-court contempt to an unspecified fine (376 U.S. at 746). No limitation was placed on the permissible fine, however, nor on the term of imprisonment which could be imposed for a contempt committed in the presence of the court. The Virginia statute authorized punishment in excess of a fifty-dollar fine for "disobedience or resistance of any officer of the said courts, party, juror, witness, or other person or persons, to any lawful writ, process order, rule, decree or command of the said courts." A jury was to determine the punishment for these "aggravated contempts," but the statute apparently left guilt or innocence to the court alone.

for particular defined kinds of contempts. But no limitation was ever put on the power of a court to punish for willful violation of an injunction or other substantive order. The only statutes we have found dealing with that power—the Maryland Act of 1785 and the New Jersey Act of 1799—authorized the imposition of unlimited terms of imprisonment for criminal contempt.

The conclusion we reach from the colonial acts is that, with rare exceptions, the colonists recognized and preserved the inherent power of courts to punish summarily for violations of their orders. With respect to trivial contempts such as the failure of jurors to appear or minor infractions of courtroom decorum, they believed it desirable to limit the punishment which the courts might inflict. But they did not thereby mean to transpose the entire range of contempts into the category of petty offenses nor did they intend to restrict the power of common law courts and courts of equity to impose appropriately severe punishments for serious violations of decrees or other orders.

This conclusion is further reinforced by the federal Judiciary Act of 1789, 1 Stat. 73, of obvious importance in the interpretation of Constitutional guarantees since it was drawn by men who had lived through the adoption of the Constitution and considered the objections thereto. The power to punish for contempt is set forth in the Judiciary Act, which created the federal courts, and not in the Crimes Act of 1790, 1 Stat. 112, which defined federal crimes. In Sections 9 and 13 of the Judiciary Act, Con-

gress gave the district courts jurisdiction over crimes and civil actions and provided that trial of isues of fact in the district court shall be by jury. Jurisdiction over contempts was not covered by either of these sections but was treated separately in Section 17, which provided that the courts shall have power to punish "by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. 83. The draftsmen of the federal statute, like those responsible for colonial and State legislation, obviously did not treat contempt as a "petty offense" or, indeed, as any crime at all. They considered a court's authority to punish for contempt to be a distinct power, quite separate and apart from ordinary criminal jurisdition.

United States v. *Hudson*, 7 Cranch 31, decided in 1812, reinforces this conclusion. The Court there rejected the suggestion that federal courts were empowered to punish common-law crimes. Mr. Justice Johnson distinguished, in that case, between ordinary criminal jurisdiction—as to which "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence" (7 Cranch at 34)—and the "implied powers [which] must necessarily result to our courts of justice, from the nature of their institution" (*ibid.*) such as the power to punish for contempt. See note 4, *supra*. We submit that in providing for trial by jury of all "crimes" or in all "criminal prosecutions" in Article III and the Sixth Amendment, the Constitutional draftsmen had in mind only the former class—*i.e.*, crimes cre-

ated by "the legislative authority." They were not intending to encroach on the "implied powers" of courts of justice to deal appropriately with those who violated court orders.

b. *The judicial practice in contempt cases.*—Judgments in contempt cases under the colonial practice lend no support to the argument that criminal contempt was "deemed a species of petty offense punishable by trivial penalties." 376 U.S. at 752. Most of the contempt cases then, as now, concerned trifling violations of courtroom decorum or failures to abide by court rules. Jurors who failed to appear when summoned were not, of course, subjected to heavy penalties, nor were persons who had engaged in petty misbehavior in or near the court. Our survey indicates, however, not only that the courts did not consider themselves bound in more serious cases to impose trivial sentences, but also that contempts were occasionally punished with severe penalties. In considering the severity of the sentences imposed, it is, of course, necessary to bear in mind the significantly different attitude taken in colonial times to the question of imprisonment [10] as well as the difference in

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[10] See note 8, *supra*, relating to Delaware. The laws of Pennsylvania were very similar to those of Delaware, both being at the close of the 17th Century within the domain of the Duke of York. It has been observed that "[a]t common law, imprisonment was used primarily as a means of custody preliminary to trial * * * or as a means of process to compel the payment of fine or the execution of a court order." Goebel and Naughton, Law Enforcement in Colonial New York (1944), p. 514. The same commentators observed that a jail sentence in New York "was most often ancillary, that is to

the value of money between those times and today. See pp. 56-57, *infra*.

Although the most usual punishment for contempt was a fine, whippings were not uncommon in some colonies during the seventeenth century. App. 23, para. 1; App. 24, para. 3; App. 97, para. D. 1; App. 126, paras. 6, 7; App. 127, para. 9; App. 128, para. 18; App. 142, para. 2; App. 147, paras. 1, 2; App. 148, paras. 6, 8, 9; App. 149, paras. 14, 16, 19; App. 152, para. 14; App. 156, paras. 3, 4; App. 157, paras, 11, 5; App. 158, para. 12; App. 318, para. 1; App. 319, para. 8. Imprisonment was also imposed for more than the period appropriate for petty offenses (pp. 52-56, *infra*). See App. 17, para. 6 [*semble*]; App. 19, para. 11; App. 24, para. 2; App. 97, para. E. 1; App. 145, para. 1 (after indictment); App. 146; para. 4 (after jury trial); App. 159, paras. 1-3 (unknown duration); App. 182, para. 11 [*semble*]; App. 197, para. 11; App. 318, para. 3 (for court session); App. 338-339. Fines, whether in tobacco or current money, also exceeded the usual fines for petty offenses.[11] App.

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say, it formed part of a complex sentence composed of fine, pillory or whipping and sometimes security after these punishments had been inflicted." *Id.* at 515.

[11] The appendices to Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 983-1019 (1926), provide some indication of the kinds of fines imposed for petty offenses. Monetary fines did not generally exceed 10 pounds current money, and, where tobacco was used as the measure, few petty offenses carried fines or more than 1000 pounds of tobacco. We therefore believe that fines of 20 pounds current money or 2000 pounds of tobacco represented punishment for a "serious" offense.

17, para. 6; App. 93, paras. 4, 5 (after jury trial); App. 94, para. 2; App. 100, paras. 6, 8; App. 105, paras. 5, 6; App. 125, para. 1; App. 126, para. 3, App. 127, paras. 8, 11, 12; App. 128, para. 17; App. 129, para. 1; App. 134, para. 17; App. 141, para. 5; App. 145, para. 1; App. 149, paras. 13, 18; App. 153, para. 20; App. 193, para. 11; App. 197, paras. 11, 13; App. 201, para. 8; App. 206, paras. 15, 17; App. 208, para. 2; App. 209, para. 5; App. 232, para. 22; App. 290, para. 5; App. 337-338; App. 338-339; App. 353, para. 1. Other penalties imposed for contempt which cannot be considered trivial included, *inter alia*, the suspension or disbarment of attorneys (App. 17, para. 5; App. 92, para. 1; App. 127, paras. 8, 11, 12; App. 141, paras. 2, 8; App. 207, para. 8, App. 208, para. 2; App. 209, para. 5), banishment (App. 127, para. 12; App. 147, para. 2; App. 148, para. 9; App. 149, paras. 13, 18), disenfranchisement (App. 16, para, 1; App. 17, para. 7), and, under one judgment which was later remitted, the nailing of the offender's ear to the pillory and its subsequent amputation (App. 128, para. 15).

Because we have been unable methodically to search chancery records for judgments in serious contempts such as willful disobedience to a specific court order, the above illustrations are not, in our view, as significant as the expressed views of judges, commentators, and litigants regarding the limitations, if any, on the punishment of contempt after summary proceedings. In Connecticut, a treatise published in 1796, observed that obstruction of court business or other misbehavior could be punished—on the judge's own

knowledge—by such imprisonment as the judge "think[s] proper, pursuant to law" (App. 21). The same view regarding summary procedures was expressed in 1761 or 1762 by Chief Justice Hutchinson of Massachusetts (App. 143-144). And what appears to us most convincing is the fact that in the entire course of the public debate on the notorious Pennsylvania contempt case of *Respublica* v. *Oswald*, 1 Dallas 319, it was never suggested by Chief Justice McKean or by those speaking on the defendant's behalf that there was any limit on the court's power to punish the contemnor summarily (see App. 272-283).

c. *Petty offense jurisdiction.*—The assertion that contempt was considered a form of petty offense at the time of the adoption of the Constitution is refuted not only by the colonial contempt statutes and judicial practice but also by the historical development and general understanding of the petty offense jurisdiction. Illustrative of the kinds of offenses which the colonists believed to come within petty offense jurisdiction were those encompassed by the Pennsylvania Act of 1700, which gave to justices of the peace the power to punish "misdemeanors, the fine of which is but small," and then defined the covered offenses as those "where the fine both not exceed twenty shillings * * * except in such cases where the law leaves the fine to the discretion of the county court." 1 Laws of Pennsylvania (1762), p. 2, ch. XXI. Statutory contempt penalties at that time often exceeded twenty shillings (App. 266, paras. 3, 4, 5; App. 268, paras. 1-3)—a circumstance which surely supports the inference that the colonists did not consider contempt a petty offense.

Similary, the enumerated offenses in the original Maryland petty offense act did not include contempt. See 1 Arch. Md. 52. The offenses covered in that act (listed in Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 999-1000 (1926)) included drunkenness, adultery, refusal to care properly for servants and sabbath-breaking, but contempt is not covered.

In fact, a general Maryland statute governing the collection of fines and penalties provided that justices of the peace could impose sentences "[w]here the sum doth not exceed five pounds current money." 1 Laws of Maryland (Kilty ed.), 1777, ch. 6. This law, enacted in 1777, was in force at the time when the statute of 1785, authorizing fines of "ten pounds current money" for contempt (see p. 41, *supra*) was adopted. This latter statute, which Mr. Justice Goldberg relied upon to demonstrate that only penalties appropriate for petty offenses could be imposed for contempt (376 U.S. at 741-742), proves the opposite —*i.e.*, the permissible fine for contempt exceeded what was thought to be in the upper limit of petty-offense jurisdiction.[12]

The New Hampshire statutes of 1699 to 1701 appear to set a limit of forty shillings on the petty-offense jurisdiction of justices of the peace. See Acts

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[12] A Maryland statute of 1791 which increased the civil jurisdiction of justices of the peace did not affect the limit on their criminal jurisdiction. See 2 Laws of Maryland (Kilty ed.) 1791, ch. 68. A 1796 statute, however, gave justices of the peace in the City of Baltimore the power to collect fines "not exceeding twenty dollars." *Id.*, 1796, ch. 68, § 9.

and Laws of New Hampshire (Green ed. 1726) 4, 7-8, 11, 14-16 (justices empowered to decide criminal cases involving forty-shilling fines but only to bind over offenders who might be fined fifty shillings).[13] Yet contempt penalties which exceeded forty shillings had been imposed in New Hampshire. See App. 176, paras. 4, 5; App. 180, para. 1; App. 181, para. 3. Indeed, on the same day on which the New Hampshire legislature enacted the statute relied on by Mr. Justice Goldberg to prove that contempt was deemed a species of petty offense (376 U.S. at 742)—*i.e.*, the statute limiting punishment for defaulting witnesses in courts of judicature to ten pounds—it also re-enacted the statute limiting the civil jurisdiction of justices of the peace to forty shillings. Laws of New Hampshire (Melcher ed. 1792), pp. 63-64 (Act of February 9, 1791). Further proof that the enumerated contempt penalty of ten pounds[14] was believed to be in excess of that which could be imposed by those who had the jurisdiction to try petty offenses (*i.e.*,

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[13] No explicit provision regarding authority in criminal cases appears in the early New Hampshire statutes, but the kinds of cases left to justices' decisions indicate that the civil limitation—"to the value of forty shillings, and under" (Acts and Laws of New Hampshire (Green ed. 1726), p. 4)—was considered applicable. The forty-shilling limitation was re-enacted in the 1791 statute establishing the court system in the State of New Hampshire. Laws of New Hampshire (1792), p. 63 (Act of February 9, 1791).

[14] This limitation applied, as we have noted above (p. 43, *supra*), only to the particular kind of contempt specified—failure to appear in answer to process. Disobedience of a court order was not expressly limited and, we submit, there was no implied limitation.

single justices of the peace)[15] is the proviso in the defaulting-witness statute limiting to forty shillings the fine which might be imposed by a justice of the peace upon a witness who fails to appear before him. Laws of New Hampshire (Melcher ed. 1792), p. 96 (Act of February 9, 1791).[16]

In *State* v. *Ziegler*, 32 N.J. L. 262, 267, the New Jersey Supreme Court of Errors and Appeals observed that the limit of petty offense jurisdiction in that colony and State had been 16 dollars. Statutes and cases indicate, however, that contempt sanctions in excess of that limit were authorized and imposed. See App. 188, paras. 7, 8; App. 190, paras. F. 1, G. 2; App. 191, para. 4; App. 193, para. 11; App. 197, para. 11; App. 206, paras. 15, 16, 17; App. 208, para. 2; App. 209, para. 5. See also *Katz* v. *Eldredge*, 97 N.J. L. 123, 127.

The 1821 codification of the Laws of Connecticut set the limit of petty-offense jurisdiction at a seven-dollar fine and one month's imprisonment. Statutes of Connecticut (1821), tit. 20, §§ 59, 99. Contempt and disorder in the courtroom was not punishable by more than seven dollars and a single month's im-

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[15] Justices of the Peace sitting in panels of two or more could assess more severe penalties. See, *e.g.*, Laws of New Hampshire (Melcher ed. 1792), pp. 339-340 (November 25, 1778).

[16] See also the North Carolina statute which, while limiting the civil jurisdiction of justices of the peace to "debts and demands of five pounds, and under" authorized a fine of one hundred pounds against defaulting witnesses in criminal cases. An Act for Establishing Courts of Law, 1777, ch. 2, §§ 43, 69. Laws of North Carolina (Iredell ed.), pp. 307, 311-312.

prisonment when the sentence was imposed by a "single minister of justice." But the limiting statute expressly authorized any "other court" to impose a sentence up to one hundred dollars and imprisonment up to six months. Statutes of Connecticut (1821), tit. 20, § 112. Since county courts were generally required to sit in panels of two (*id.*, tit. 19, § 17) and superior court judges were also required to sit in pairs on capital cases (*id.*, tit. 19, § 9), there were apparently many situations in which courtroom disturbances could be punished by penalties exceeding those permitted for petty offenses. And it should also be noted that the limitations imposed on contempt punishments by two-judge panels for courtroom disturbances did not, of course, apply to disobedience of a court order. In his authoritative treatise on the law of Connecticut, the State's Chief Justice, Zephaniah Swift, discussed disobedience of injunctions separately from courtroom disorders. 2 Swift, Digest of the Laws of Connecticut (1823), pp. 143-144, 358-360.[17]

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[17] Swift's remarks regarding disobedience of court orders indicate that orders of the colonial and early State courts were seldom, if ever, disobeyed (2 Swift, Digest of the Laws of Connecticut (1823), p. 144):

> Courts of equity have also a power, generally, to commit for contempts. A contempt is a disobedience to the court by acting in opposition to the authority, justice, and dignity thereof: and it commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court. In all these cases, the party disobeying is liable to be attached, and committed for the contempt. This is a copious branch of learning in England: but not having been found necessary in our practice, it has not been introduced here, and it is unnecessary further to consider it.

In determining whether the Constitutional draftsmen viewed criminal contempt as "a species of petty offense" and intended, therefore, to permit nonjury trials for contempt only when the penalty was trivial, it is important to consider that what appears to be trivial punishment today may very well have been severe by the standards of the latter half of the eighteenth century. Imprisonment as we know it today was not deemed the usual means of punishing offenders. "All that can be stated with accuracy is that at the beginning of the eighteenth century imprisonment was unusual, except as applied to political and religious offenders and debtors, while before the middle of the nineteenth century it was the conventional method of punishing crime in both Europe and America. The eighteenth century was the century of transition from corporal punishment to imprisonment, and, though the process of change was most rapid after 1775, there can be no doubt that the general movement was in progress during the entire period." Barnes, *The Historical Origin of the Prison System in America*, 12 Journal of the American Institute of Criminal Law and Criminology 35, 36 (1921); see generally *United States* v. *Moreland*, 258 U.S. 433, 445-447 (dissenting opinion); 18 Encyclopedia Britannica—*Prison* 514, 518-519 (1958). A usual punishment for many noncapital crimes in colonial days was a fine, and the fine imposed for even serious offenses may appear small by modern standards. But we submit that when judged by the standards of the time—which may be gauged in terms of the limits of petty-offense or small-claims jurisdiction—the penalties authorized and imposed

for contempt exceeded the range of "trivial" punishments.

Furthermore, this Court's decisions concerning the petty-offense exception to the constitutional right to a jury trial are inconsistent with any suggestion—such as that made in the *Barnett dictum*—that the scope of the exception is measured by the actual punishment imposed in a given case. Whether an offense amounts to a "crime" in the constitutional sense or is merely a "petty offense" for which no jury is required was said, in *District of Columbia* v. *Colts*, 282 U.S. 63, 73, to depend "primarily upon the nature of the offense." In the *Colts* case, as in *Callan* v. *Wilson*, 127 U.S. 540, neither the fact that the maximum punishment provided by the statute under which the defendant was prosecuted was not severe nor the fact that the defendant actually was given a trivial penalty removed the offense involved from the constitutional category of "crimes." And in *Schick* v. *United States*, 195 U.S. 65, 68, the Court observed that "the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses * * *."

The "amount of punishment prescribed" may, of course, reflect on the seriousness of the offense if the maximum is greater than what may be provided for petty offenses. In *District of Columbia* v. *Clawans*, 300 U.S. 617, for example, a sentence of 60 days was imposed upon an accused convicted of selling second-hand property without a license. The Court passed on the constitutionality of proceeding without a jury in that case not in light of the sentence actually im-

posed, but in light of the 90-day maximum sentence which the statute provided. The Court observed that the maximum penalty prescribed by the statute could not be said to give "it the character of a common law crime or of a major offense * * *." 300 U.S. at 630.

These decisions demonstrate that it has consistently been this Court's view that whether an offense is "petty" or whether it comes within the Constitution's provision of jury trial for "crimes" depends not on the sentence actually imposed but on the seriousness of the offense and the maximum permissible penalty. The rule suggested by the *dictum* in *Barnett*—that the severity of the actual sentence and not the seriousness of the offense (or the maximum permissible penalty) be the constitutional touchstone—is inconsistent with these decisions.

2. *Policy.*—The historical materials appear to be dispositive of the constitutional issue insofar as they demonstrate that the Constutional draftsmen did not distinguish among contempts according to the severity of the sentence or the seriousness of the contemnor's behavior. We believe, however, that an evaluation of the policies underlying the issue of jury trial in these cases will demonstrate that neither the *Barnett dictum* nor Mr. Justice Goldberg's dissenting view accords with sound judicial administration.

Throughout Anglo-American history contempt proceedings designed to impose sanctions for violation of the process or orders of the courts have been regarded as *sui generis* and hence not subject to all of the requirements attendant upon the conduct of ordinary criminal proceedings. More particularly, it has been thought essential to the dignity and to the ef-

fective functioning of the judiciary that the courts have power to vindicate directly their lawful decrees and that enforcement not be subject to the hazard that individual jurors might be unsympathetic to such decrees. The constitutional guarantee of trial by jury, when applicable, includes the requirement that the verdict be unanimous. *Maxwell* v. *Dow*, 176 U.S. 581, 586; *Andres* v. *United States*, 333 U.S. 740. Thus, if a jury trial were required in order to punish disobedience of a judicial writ or decree, a single juror lacking in sympathy with the underlying order could render it ineffective. Such a result would undermine the independence of the federal courts, which the Constitution sought to protect against the will of temporary popular majorities by providing life tenure for federal judges and prohibiting the diminution of judicial compensation.

The rules proposed by the *Barnett dictum* and by Mr. Justice Goldberg's dissent would have their most damaging effect precisely when the need to vindicate a court's authority and to demonstrate its independence is greatest—when the behavior charged to an alleged contemnor is such that a heavy punishment would be appropriate. It is in just such a case—illustrated most graphically by the allegations made in *Barnett*—that the orders of the independent federal judiciary ought not to be exposed to nullification by a single unsympathetic juror.

The authority of this Court, as well as other federal courts, rests upon effective use of the contempt power to vindicate the court's mandate. This Court customarily issues mandamus and other orders under the

all-writs statute (28 U.S.C. 1651) and various stays or injunctive orders to preserve its jurisdiction pending disposition of a case. For example, the Court, or a single Justice, may stay the execution of a prisoner by State authorities while the Court considers the prisoner's case. Thus, in *United States* v. *Shipp*, 203 U.S. 563, after a stay of execution had been issued by this Court, a sheriff was charged with delivering the prisoner—a Negro accused af raping a white schoolgirl—into the hands of a local mob which lynched him. This Court then instituted contempt proceedings, and took testimony through a commissioner whom it appointed specially (214 U.S. 386, 471). On the basis of the written record of this testimony, the Court, after argument, adjudged the defendants guilty (214 U.S. 386), and sentenced several of them to imprisonment (215 U.S. 580). If the defendants in the *Shipp* case had had a constitutional right to trial by jury—which they might well have been entitled to under Mr. Justice Goldberg's proposed rule or even, on the face of the charge, under the *Barnett dictum* [18]—they would have been tried in Tennessee (U.S. Const., Art. III, Section 2, Clause 3, and Amendment VI) where the lynching occurred. One can only speculate whether, in such circumstances, this Court's authority would have been vindicated, and whether the outcome

[18] Some defendants were sentenced to 90 days' imprisonment and some to 60 days, so that the prison terms apparently satisfied the *Barnett dictum*. On the face of the charge, however, the Court could reasonably have believed that a more severe sentence would be warranted. Before evidence was taken, therefore, it might have thought it necessary to impanel a jury. See pp. 63-64, *infra*.

of such a proceeding might not have affected compliance with similar orders of this Court in subsequent cases.[19]

The likelihood, or even the possibility, that his guilt or innocence will be determined by a jury which may include one or more persons who are as unsympathetic as he to a court's order surely provides some encouragement to a potential contemnor and correspondingly diminishes the probability of his compliance with the order. The deterrent effect of a punitive sanction for violation of a court order is necessarily reduced when the party subject to the order knows that the court must choose between (1) rendering punishment of guilty violators less certain by leaving guilt or innocence to a jury and (2) limiting the possible penalty to that provided for petty offenses. In addition, a jury trial usually consumes more time than a nonjury trial and involves a greater disruption of a court's usual flow of business. The administrative burden is particularly severe when the court whose order is being flouted is a court of appeals, or, indeed, this Court. If a jury trial were required for every serious violation of an appellate court's order (or in every in-

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[19] As this Court observed in *In re Debs*, 158 U.S. 564, 594-595: "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

stance wherein the court intended to impose a sentence in excess of six months), jury machinery would have to be created or, at best, adapted from that used by the district courts. This would probably involve a serious interruption of the appellate court's usual business.

The rule proposed by the *Barnett dictum* (in contrast to that suggested by Mr. Justice Goldberg) raises particularly perplexing practical problems. The decision whether or not to impanel a jury must be made, of course, before the evidence is heard. At that juncture, the trial judge usually is unaware of the various considerations which will enter into the imposition of sentence if the defendant is found guilty. If the contempt consists of disobedience of a court order out of the presence of the court, the judge cannot know the degree of contumaciousness or what motive prompted the contempt—if any was committed. Nor is he likely to know the alleged contemnor's criminal record or any biographical data which might become available after or during trial. Hence the decision whether to impanel a jury will necessarily be made in the dark. A judge who decides to proceed without a jury may learn facts in the course of a trial which would, in his view, justify a sentence exceeding six months, but his mistaken choice of the nonjury route would bar him from imposing the warranted prison term. Conversely, a judge who impanels a jury because he believes the contempt to be a serious one warranting a severe penalty may discover that there were mitigating factors which would render a heavy penalty excessive. It might then be undesirable to

dismiss the jury—assuming that such a step could permissibly be taken. The impracticality of making trial by jury turn on the actual sentence imposed—which is what the *Barnett dictum* does—is doubtless the reason why no analogy to the rule suggested in the *dictum* can be found anywhere else in the law. The usual line between jury and nonjury offenses is drawn, as we have shown above (pp. 57-59, *supra*), on the basis of *possible* punishment or according to the gravity of the offense. But to make the right to jury trial depend on the sentence which will be imposed after the trial is concluded is to distribute a constitutional right according to blind chance—the defendant whose judge underestimates the likely sentence will be deprived of a jury; the defendant whose judge overguesses may be given a jury without being entitled to one.[20]

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[20] We lay to one side the Fifth Amendment problems which flow from a rule such as that proposed by the *Barnett dictum*. In *Green* v. *United States*, 356 U.S. 165, 184-185, this Court rejected the claim that contempts had to be proceeded against by indictment on the ground that since they were not "crimes" or "criminal prosecutions" they obviously could not be "infamous crimes" within the meaning of the Fifth Amendment. But if contempts punished by sentences in excess of six months are "crimes" within the meaning of Article III, they may also be considered "infamous crimes" for purposes of the Fifth Amendment. This would mean that not only would a judge have to guess the likely sentence before deciding whether to impanel a jury, but that a federal prosecutor would also have to guess what a judge's thinking might be in deciding whether to proceed against a suspected contemnor by way of indictment, information, or notice (as provided in Fed. R. Crim. P. 42(b)).

Nor is the rule proposed by the *Barnett dictum* a significant protection against unfair convictions for those accused of contempt. Even under that rule a district judge could summarily convict an alleged contemnor and sentence him to less than six months' imprisonment (or to whatever term is the constitutional maximum for petty offenses). The *Barnett dictum* does not, therefore, afford protection against unfair determinations of guilt; it merely insures that lengthy imprisonment will not be imposed without the intervention of someone other than the judge. A similar safeguard—available for contempt cases but not for other crimes—is the rule that appellate courts may review and revise contempt sentences. See, *e.g.*, *Green* v. *United States*, 356 U.S. 165, 187-188; *United States* v. *United Mine Workers*, 330 U.S. 258. In the contempt area, therefore, there is no reason to fear that excessive uncorrectible punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court.

Finally, we emphasize that there is no reason to apprehend that the power to punish summarily for contempt will be abused by the courts. In trying a defendant for disobedience of a court order, "[t]he court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case." *United States* v. *Shipp*, 203 U.S. 563, 574 (per Mr. Justice Holmes). A defendant in a criminal contempt case receives the full protection of

due process. He is presumed to be innocent, his guilt must be proved beyond a reasonable doubt, and he cannot be compelled to testify against himself. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson* v. *United States*, 266 U.S. 42, 66. If the alleged contempt is committed out of the presence of the court, the defendant receives notice of, and has a reasonable opportunity to meet, the charges against him; he may retain and consult with counsel; and he has the right to present his own witnesses or to cross-examine others. *Cooke* v. *United States*, 267 U.S. 517, 537. And if the contempt "involves disrespect to or criticism of a judge" (F.R. Crim. P. 42(b)) or if the judge is "personally embroiled" with the defendant (*Offutt* v. *United States*, 348 U.S. 11, 17), the judge must disqualify himself. In these circumstances the right to a trial by jury is not essential in order to insure the fairness of the contempt proceeding.

B. *No jury is constitutionally required for contempts committed in the presence of the court.*

For the reasons stated above, we believe that the Constitution should not be construed to require a jury trial on any contempt charge, irrespective of the nature of the conduct or the severity of the sentence. In any event, we think it is clear that when an alleged contempt is committed in the courtroom before the eyes of the presiding judge, the power to impose reasonable punishment summarily is well established. This case does not involve courtroom misconduct—which is the kind of contempt usually thought of as being "in the presence of the court"—but much of the justification for punishing such con-

duct summarily applies when, as here, a person physically present in court defies a court order to the presiding judge's face. The dignity of the court can be best maintained and its authority most effectively vindicated if the judge has the power to compel obedience to his orders by imposing summary punishment —subject, of course, to review by a higher court of the lawfulness of the underlying order and the reasonableness of the sentence.

The distinction between contempts committed in the presence of the court and those occurring outside the courtroom dates back to the common law and has been recognized by this Court as recently as *In re McConnell*, 370 U.S. 230, 232-234. Blackstone stated the governing rule in a form which this Court approved in *Ex parte Terry*, 128 U.S. 289, 307. See 4 Blackstone, *Commentaries*, 286:

> If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof of examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party, or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to shew cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does, if no sufficient cause be shewn to discharge, and thereupon the court confirms and makes absolute, the original rule.

See also *Cooke* v. *United States*, 267 U.S. 517, 534-535.

In *Fisher* v. *Pace*, 336 U.S. 155, this Court sustained a State contempt sentence imposed summarily on an attorney who had repeatedly violated a court instruction not to refer in his argument to matters which were not for the jury's consideration. The Court observed (*id.* at 159-160):

> Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law.

This historical power necessarily given to courts "to preserve their authority and to prevent the administration of justice from falling into disrepute" applies, of course, to federal as well as State courts, and it was formally recognized by Congress in its enactment of subsection (1) of 18 U.S.C. 401, which authorizes a federal court to punish contempts consisting of "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." This Court has read the statute as "undoubtedly show[ing] a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business." *In re McConnell*, 370 U.S. 230, 234.

The importance of being able to punish contempt summarily is not significantly different in the case of the recalcitrant witness then it is in the case of the boisterous or insulting attorney, party, witness or spectator. In the former case, as in the latter, the dignity and authority of the court is at stake, and the threat of subsequent proceedings and possible punishment does not meet the need for immediate and obvious vindication. If, for example, a witness testifying in a civil or criminal case refuses politely to answer any questions on cross-examination notwithstanding the explicit instruction from the court that he answer, the court has authority to punish the witness summarily. If the underlying order to testify is sustained on appeal, the sentence may be imposed. *E.g.*, *Brown* v. *United States*, 356 U.S. 148, 153-154, "a doubt has never been uttered that stubborn disobedience of the duty to answer relevant inquiries in a judicial proceeding brings into force the power of the federal courts to punish for contempt".

The contempt involved in this case is not materially different from that involved in *Brown* v. *United States*, 356 U.S. 148. A witness who wrongfully refuses to testify before a grand jury obstructs judicial business just as does a witness who unjustifiably refuses to testify before a petit jury.[21] If the refusal is made in the presence of the judge whose order is being violated (or any other judge), it is a direct contempt which is punishable summarily. The

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[21] This Court described a grand jury as "an appendage of the court" in *Brown* v. *United States*, 359 U.S. 41, 49.

applicable principle is that which excepts from the usual requirements of hearing and notice those contempts which concern "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct * * * are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U.S. 257, 275. In the present case, the judge joined the grand jury and, in its presence, put the prescribed questions to petitioner. Court was "open" at the time (R. 33, 60), the judge was present and a judicial proceeding was being conducted. No testimony other than what the judge saw and heard was required to support petitioner's conviction, and petitioner's legal claim that he was not required to answer had been fully argued before the order to testify was made. In these circumstances, the settled principle that direct contempts may be punished summarily, without the intervention of a jury, was applicable. There has never been any suggestion that this power is limited to the imposition of trivial penalties, and, we submit, nothing in the history of the contempt power in England or the colonies supports the proposition that there was an implied limitation on the exercise of this power.

C. ***No jury is required if a contempt is committed in the presence of the court and the contemnor raises no issues of fact.***

Even assuming *arguendo* that some contempts committed in the presence of the court might, under Mr.

Justice Goldberg's rule or the *Barnett dictum*, be triable to a jury, we submit that the present case is one in which jury trial would be totally inappropriate. Petitioner's only defense was a legal one—he challenged the validity of the immunity conferred upon him on the ground that no violation of the Communications Act was being investigated. The issues raised by this defense—even if factual in nature—were for the court to decide. *Sinclair* v. *United States*, 279 U.S. 263, 298; *United States* v. *Williams*, 341 U.S. 58. The court resolved those issues adversely to petitioner before he was directed to testify. The only factual issue remaining was whether petitioner had knowingly refused to comply with the court's order—whether he had refused to answer questions which the judge had directed him to answer. His conduct in this regard had been committed in the judge's presence; the judge, as well as the court reporter, could attest to what had happened. And, indeed, petitioner has never disputed that the facts occurred as recited in Judge McLean's certification (R. 39-40).

In considering whether the Constitutional draftsmen intended to confer a right to trial by jury in a case such as this one, it is important to observe that the constitutional right rests on the principle that "[t]rial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of *issues of fact* in criminal cases above the grade of petty offenses." *Patton* v. *United States*, 281 U.S. 276, 312 (emphasis added). It is true, of course, that unless a defendant pleads guilty he is entitled in the ordi-

nary criminal case to put the prosecution to its proof, and to demand that the verdict be rendered by a jury. He has this right even if he intends to produce no evidence and not to challenge—even in argument—any fact alleged by the prosecution. But contempts committed in the presence of the court—*i.e.*, "direct" contempts—are, as we have shown (pp. 67-68, *supra*), different from other offenses and even distinguishable from other contempts. While there is, therefore, a constitutional right to a jury trial on all criminal charges (excluding petty offenses) even if the facts are undisputed, and while there may arguably be such a right even in contempt cases involving conduct committed out of the presence of the court or in the courtroom if an issue of fact is raised,[22] there is no reason to extend the right to direct contempts involving no factual issues. The only conceivable purpose served by such a rule would be to allow juries to nullify court orders by releasing violators notwithstanding their admitted contemptuous conduct. This prerogative is not, we submit, what the Constitution sought to preserve.[23]

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[22] If, for example, the judge and the alleged contemnor differ as to what happened in the courtroom it might be appropriate (if a jury trial is constitutionally required in contempt cases) for the differing versions to be submitted to a jury for resolution. The judge would then testify in the subsequent proceeding which would, presumably, be presided over by another judge.

[23] Nullification of criminal statutes presents quite different considerations. The basic function of the criminal law is to protect the majority against the depredations of a few. Consequently, if there are circumstances in which a jury dis-

D. *No jury is constitutionally required for the imposition of a coercive contempt sentence such as the one involved in this case.*

The terms of the sentence imposed on petitioner make it clear that the judge's principal concern was to compel obedience to his order and not to punish petitioner for his past disobedience. The judge explicitly noted that he would consider a motion for reduction of sentence if petitioner testified. While the sentence did not explicitly state that petitioner "carr[ied] the keys of [his] prison in [his] own pockets" (*In re Nevitt*, 117 Fed. 448, 461), the implication to that effect was unmistakable.

In the circumstances of this case, a criminal sentence of this sort was "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *In re Michael*, 326 U.S. 224, 227. As we have previously demonstrated (pp. 21-22, *supra*), the usual coercive "civil contempt" remedy is ineffective when testimony which is needed for an ongoing investigation or in the course of a trial is being sought. A contemnor may disobey with impunity a court order to testify if he knows that the

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agrees with the philosophy of a criminal statute and acquits for that reason alone, society is prepared to accept this decision as a reflection of a community consensus that the law is generally unjust or that it would be unfair to apply it in the particular case. The same is not true of a court order, however. The order may protect an unpopular plaintiff, for example, or it may enforce terms which are generally unpopular in the community but are necessary to vindicate a private right. Enforcement cannot be made to hinge, in such cases, on the popular consensus reflected in a jury verdict.

only coercive sanction available is imprisonment for the duration of a trial or for the term of the investigating grand jury—and that these sanctions are likely to be stayed pending appellate review of the order to testify. If "civil contempt" had been invoked here, and if the order committing petitioner to jail had been stayed until final disposition of the legal claim concerning the validity of the immunity conferred upon him, petitioner might have gambled on delaying the proceedings until the expiration of the grand jury's term, so as to be able to escape imprisonment altogether. The criminal sentence put petitioner to the choice of testifying or pursuing his appellate remedies with the attendant risk that if his legal claim were ultimately rejected he would be compelled to serve his sentence. Hence only the criminal sanction could effectively coerce compliance.

The power of courts to commit summarily for contempt when such commitment is necessary to obtain compliance with a court order has been acknowledged even by those Justices who are of the view that all criminal contempts—irrespective of their triviality or the pettiness of the sentence—are triable to a jury. See dissenting opinions in *Sacher* v. *United States*, 343 U.S. 1, 22; *Green* v. *United States*, 356 U.S. 165, 197-198; *United States* v. *Barnett*, 376 U.S. 681, 727-728 n. 6, 753-754. When, as here, a sanction—concededly "criminal" in form—is imposed as the "least possible power" whereby to obtain compliance with a court order, it should stand on no different footing, for purposes of procedural guarantees and the right to jury trial, than what might formally be denominated

"civil contempt." Only in this manner can the observation of Mr. Justice Holmes (quoted and approved in the dissenting opinions cited *supra*) that he would "go as far as any man in favor of the sharpest and most summary enforcement of * * * obedience to decrees" (*Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, 425-426) be carried into effect. We submit, in other words, that when—as here—a criminal penalty is made conditional on future noncompliance with the court order which the contemnor has previously disobeyed, it should be considered no different, for purposes of Article III and the Sixth Amendment, from civil contempt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SEPTEMBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 786747 181

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INTRODUCTION

The materials contained in this Appendix are the results of a survey of early American legal materials made primarily by lawyers in the Department of Justice under the direction and supervision of Professor Joseph H. Smith of Columbia University School of Law as a Special Consultant to the Department of Justice. Professor Smith has worked extensively with the legal materials for the American colonial period and has published books and articles on various aspects of American colonial legal history. The following lawyers from the Department of Justice participated in the research: Paul S. Adler, George M. Beasley, III, L. David Cole, Julia P. Cooper, Sidney M. Glazer, G. Lee Oliver, Edward O. C. Ord, Stephen Paley, Paul C. Summitt and Theodore Wieseman.

Some research was also conducted by two student research assistants of Professor Smith's—Burton Z. Alter and Timothy T. McCaffrey. The arrangement of the research product in categories was largely the work of Richard W. Schmude, formerly of the Department of Justice, and Professor Smith.

The survey was primarily aimed at two objectives: (a) an examination of all the colonial and early statehood statutes relating to contempt in the original thirteen states; (b) an examination of all the contempt cases in the surviving records of the principal common law courts of said thirteen jurisdictions for the colonial and early statehood periods.

The year 1800 was adopted as a cut-off date since (1) it has been generally accepted by archivists and bibliographers as of some significance; (2) it marks a date by which printed reports of judicial decisions had started to become generally available; and (3) it allowed the detection of any trends which may have been in the making in the period of the Constitution convention, the passage of the Judiciary Act of 1789 and the adoption of the Bill of Rights.

The research was restricted to common law courts since the extant records of the chancery courts, vice-admiralty courts and courts of probate and administration are relatively scanty and inaccessible.

The restriction of the research to the "principal" common law courts meant, for the most part, that only the records of courts with colony-wide jurisdiction were examined. Thus in most jurisdictions no attempt was made to examine the numerous volumes of county court records still extant. However, in some jurisdictions where the records of the principal court had been destroyed (as in Virginia) or were scanty (as in Delaware), county court records were examined on a selective basis (Virginia) or in their entirety (Delaware). From the selective examination conducted it appears unlikely that inclusion of all or substantially all of the county court records would have altered to a significant degree the pattern revealed by the materials set forth below. Perhaps there would have been a greater preponderance of contempts involving misconduct in court (judicial decorum was more often lacking on the county court level).

It should also be noted that the examination of the "records" of the principal common law courts was generally limited to judgment books and minute books or, in a few instances, appearance dockets. In some jurisdictions extensive collections of file papers have been preserved; no attempt was made to examine all of these papers, but some selective examination was undertaken. Since the contemporary indices to the judgment books or minute books were of little assistance in the instant project, each volume had to be examined on a page-by-

page basis. In some jurisdictions, such as Rhode Island and New Hampshire, it is obvious that the surviving court records do not accurately reflect the volume of contempts, particularly those dealing with the non-appearance of jurors or witnesses.

There were, of course, no printed reports of the opinions or decisions of any colonial courts circulating in the 17th or 18th century. A few reports of cases preserved among the papers of lawyers or judges have been printed since 1800, such as those of the General Court of Virginia by Randolph, Barradall and Jefferson, those of the Provincial Court of Maryland by Daniel Dulaney, those of the Superior Court of Massachusetts by Josiah Quincy and those of the Superior Court of Connecticut by William Samuel Johnson. The survey naturally included such materials and any of the early printed reports appearing before 1800 or reporting cases decided prior to that date.

Most of the acts or statutes of the colonial and early statehood periods are in printed form, either in collected laws or in sessions laws. A few are still in manuscript form; others known to have been enacted have not survived. In any event, much of the statutory material was examined on the microfilm collection of the Library of Congress (See A Guide to the Microfilm Collection of Early State Records, prepared by the Library of Congress in Association with the University of North Carolina (1950)).

Only a small proportion of the court records examined exist in printed form. This necessitated extensive examination in the field of manuscript materials located in the following cities, among others: Hartford, Connecticut; Dover, Delaware; Annapolis, Maryland; Boston, Massachusetts; Concord, New Hampshire; Trenton, New Jersey; Albany and New York, New York; Philadelphia, Pennsylvania; Providence and Newport, Rhode Island; and Columbia, South Carolina. The court records of North Carolina (located in Raleigh) and of Virginia (located in Richmond) were examined on microfilm. The remaining records of Georgia were deemed too scanty to warrant travel to the several depositories. All manuscript records utilized in the materials below are characterized with an "Ms." prefix; the location of each class of such materials is also indicated.

The results of the extensive research undertaken are set forth below by jurisdictions. At the start of each of the thirteen jurisdictional listings is a section entitled "Judicial Establishment" designed to facilitate identification in the judicial hierarchy of the courts referred to in the statutes and court records. The second section lists the colonial and state statutes relating to contempt found in the research undertaken; these are divided into various categories which, it is believed, reflect legislative intent and, for the instant purposes, are meaningful. Admittedly there is some overlap between cate-

gories and other arrangements might have as much validity. In the third section those contempts regarded as arising under the several statutes are enumerated by categories. The fourth section attempts to set forth some of the statutory and other material bearing on the extension of the common law of England to the particular jurisdiction. Considerations of space alone make it necessary to handle this section on a selective basis. In the last section there is listed all contempts found arising under the common law or usage, as opposed to those arising under a particular colonial or state statute. In some instances these cases have been categorized; in others, where not too numerous, they have merely been listed chronologically.

The term "contempt of authority" had a broad meaning in the colonial period; it comprehended conduct in the nature of sedition and conduct in contempt of the executive authority. A number of these cases appear in the early New England court records; to the extent the records permit identification, they have been excluded from the materials set forth below. A few later cases, largely from Massachusetts during the Revolution and Shay's Rebellion, have been included as illustrating the interplay of what are now termed "contempt of court" and "sedition" respectively.

A scattering of statutes dealing with the non-appearance of witnesses contemplated recovery by the party injured by means of *qui tam* actions, actions of debt or

actions on the case. No attempt was made to locate and enumerate such cases. Most likely such actions would normally be brought before one or more justices in a county court.

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I. Judicial Establishment

The General Court or General Assembly, primarily a legislative body, exercised some ill-defined judicial powers; in the seventeenth century it was regarded as the court of final appellate jurisdiction. The earliest court of original jurisdiction was the Particular Court; established in 1639, it exercised original jurisdiction comparable to that exercised later by the county courts. It continued in existence until a system of county courts

exercising both civil and criminal jurisdictions (the latter limited to offenses not punishable by life, limb or banishment) was set up in 1665. The principal court of the colony was the Court of Assistants, established in 1666; its name was changed to the Superior Court of Judicature in 1711. Primarily it exercised appellate jurisdiction in civil matters over the county courts and original jurisdiction over the more serious criminal offenses. The Revolution brought about no substantial change in this court system. The research has included an examination of the extant records of the General Court or General Assembly, and of the judgment books of the Particular Court, the Court of Assistants and the Superior Court.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. A fundamental law of Connecticut, presumably copied from Massachusetts Bay, which extended in statutory form throughout the colonial and early statehood periods, provided that no man's person should be restrained or imprisoned prior to sentencing if he posted sufficient security or bail for his appearance and good behavior "unless it be in Crimes Capital, and Contempt in open Court, or in such cases where some express Law doth allow it." The Book of the General Laws For the People within the Jurisdiction of Connecticut (1673) p. 32; Acts and Laws Col. Conn., p. 2 (1750); id., p. 2 (1754); id., p. 2 (1769); Acts and Laws State Conn., p. 2 (1784); id., p. 2 (1786); id., p. 22 (1796).

B. *Defamation or Abuse of Court or Court Official*

1. The Code of 1650, established by the General Court, provided that whoever defamed any courts of justice, or the sentences and proceedings of the same, or any of the magistrates or judges of any such courts, in respect of any act or sentence therein passed, and being thereof lawfully convicted in any General court, or court of magistrates, should be punished for the same, by fine, imprisonment, disfranchisement, or banishment, as the quality and measure of the offense should deserve. The Book of the General Laws for the People within the Jurisdiction of Connecticut, p. 41 (1673). This provision was carried forward through the colonial and early statehood periods. Acts and Laws Col. Conn., pp. 67-68 (1702); id., p. 40 (1750); Acts and Laws State Conn., p. 142 (1796). The 1750 edition added that the penalty for the offense was to be such as "in the opinion of the Court before whom the Trial is had [it] shall deserve." As to the significance of the "lawfully convict" clause see the discussion of the Massachusetts Bay statutory counterpart below, pp. 115-116.

C. *Misconduct in Court*

1. On May 9, 1667, the General Court ordered and empowered the several officers and ministers of justice, upon the examination or trial of any person for delinquency, if any such person should in their words and actions carry it contemptuously or disorderly, to inflict such punishment upon them as they should judge most suitable to the nature of the offense, provided no "particular minister of justice" should inflict any punish-

ment than imprisonment or stocking or binding them to the peace or good behavior until the next county court or a fine not exceeding 20 shillings. Public Records of the Colony of Connecticut, Vol. 2 (ed. J. H. Trumbull, 1850), p. 60.

2. In the revised laws of 1672 it was provided that if any person on their examination or trial for delinquency, either in words or actions have or carry themselves contemptuously or disorderly, it should be in the power of the court, assistant or justice to inflict such punishment as shall seem most suitable to the nature of the offense, provided no single minister of justice should inflict any other punishment upon such offenders than imprisonment, binding to the peace or good behavior till the next county court, putting them in the stocks for not exceeding two hours, or imposing a fine not exceeding 30 shillings. The Book of the General Laws for the People within the Jurisdiction of Connecticut, p. 19 (1673). Substantially the same provisions appeared in later editions of the laws. Acts and Laws Col. Conn., pp. 26-27 (1702); id., p. 26 (1715); id., p. 41 (1754); id., p. 42 (1769); Acts and Laws State Conn., p. 40 (1784); id., p. 143 (1796). In the 1784 edition and later the provision extended to persons in the presence of the court and not under examination or trial; in the 1796 law 30 shillings was changed to $5.

3. An act of May 10, 1704, to prevent disorderly pleading in courts of judicature, directed and empowered the courts to take special care to maintain good order and to avoid clamor and noise preventing justice and to that end to give rules for orderly pleading, oblig-

ing all parties to speak one after another in turn and to impose fines not exceeding 5 shillings upon persons violating such order. Act of May 10, 1704, Sessions Laws. See also Acts and Laws Col. Conn., p. 10 (1754).

4. It was also provided that if any member of any court should use reproachful or unbecoming speeches or behavior towards any magistrate, judge or member of the court in the face of the court, he should be sharply reproved by the governor or judge of that court for the time being and, if the person so reproved should reply again without leave, he was to be bound over to the next Superior Court to answer for the same. Acts and Laws Col. Conn., p. 35 (1750). Repeated in Acts and Laws Col. Conn., p. 35 (1769).

D. *Failure of Jurors to Attend Court*

1. It was provided in the 1702 laws that if any person legally summoned to serve on a petty jury in either the Court of Assistants or the County Court defaulted, without reasonable excuse made and accepted, he was to be fined 20 shillings. Acts and Laws of His Majesty's Colony of Connecticut in New England (1702), p. 3.

2. In the 1750 laws it was provided that in civil actions the court might set a reasonable fine, not exceeding 20 shillings, upon such officer or jury-man as should be disorderly or neglect or refuse a due attendance of their duties while attending the court. Acts and Laws of His Majesty's Colony of Connecticut in New England (1750), p. 6. The same 1750 laws, in An Act for Providing, and Regulating of Jurors in Civil Actions, reduced the forfeiture for defaulting jurors to 10 shillings (including jurors *de talibus circumstanti-*

bus) and provided a 50 shilling forfeiture for towns neglecting to choose jurymen. Id., pp. 102-04. The same provisions were continued in the laws of 1769 (Acts and Laws of His Majesty's Colony of Connecticut, in New England (1769), pp. 6, 103-04, 337-38) and in the laws of 1784 (Acts and Laws of the State of Connecticut in America (1784), pp. 6, 108-09).

3. The 1672 laws provided that any grand jury-man warned to appear at a County Court to serve on the grand jury who neglected to appear according to warrant or refused to take his oath should forfeit 20 shillings to the County Treasury. The Book of the General Laws for the People within the jurisdiction of Connecticut (1673), p. 27.

4. In the laws of 1702 it was provided that persons required to serve on grand juries who neglected or refused to appear or take the oath without sufficient excuse should forfeit 20 shillings to the County Treasury. If a grand juror neglected to make presentment required to serve on grand juries who neglected or of any breach of law he was to pay a fine of 10 shillings to the County Treasury. Acts and Laws of His Majesty's Colony of Connecticut in New England (1702), p. 45.

5. In the laws of 1750 An Act Concerning Grand-Jury-Men provided that persons refusing to serve as grand jurors when elected should incur a penalty of 26 shillings and any grand juror neglecting or refusing to appear was to forfeit 20 shillings. Any grand juror, after being sworn, who neglected to make reasonable presentment of any breach of law whereof he had cognizance was to forfeit 10 shillings. A town neglecting to make choice of grand jurors as directed was to incur

a 5 pound penalty to the County Treasury to be recovered by bill, plaint or information. Acts and Laws of His Majesty's Colony of Connecticut in New England (1750), pp. 83-84. It was continued in the 1784 laws. Acts and Laws of the State of Connecticut, in America (1784), pp. 92-93.

E. *Failure of Witnesses to Appear or Testify*

1. The 1702 laws provided that any witness who did not appear pursuant to lawful summons, having no reasonable let or hindrance, should forfeit 40 shillings and yield such further recompense to the party aggrieved according to the loss or hindrance sustained by reason of the non-appearance of such witness, the said sums to be recovered by the party aggrieved by action of debt, bill, plaint or information in any court of record. Acts and Laws of His Majesty's Colony of Connecticut in New England, pp. 116-17 (1702). This provision was reiterated in later laws. Id., pp. 254-55 (1754); id., p. 255 (1769); id., p. 263 (1784).

2. By an act of May 13, 1703, any person called by civil authority to give evidence in a criminal cause who refused to take the oath (unless contrary to his religious scruples) and "make Answer so far as he is Capable to Such Questions" was to be "committed to the County Gaol there to remain untill he shall make Oath that he will give Evidence as aforesaid and to remain in Said Gaol at his own Cost and Charge." Act of May 13, 1703, Session Laws.

3. By a law of May, 1711, any person "who shall be Required to Appear, and give his Evidence upon the Trial or Examination in criminal matters and who "shall refuse to Appear or to make Oath to declare his

knowledge in the Case", the court, assistant or justice holding the trial might "Apprehend, and Commit the Person So Refusing to Gaol, there to remain at his own Cost till he shall give Evidence." Act of May 10-31, 1711, Acts and Laws Col. Conn. (1715). This statute continued in effect throughout the remainder of the colonial period and into the early statehood period. Id., p. 42 (1750); id., p. 42 (1754); id., p. 42 (1769); Acts and Laws State Conn., p. 39 (1786); id., p. 143 (1796).

F. *Failure to Assist Court Officers*

1. In the laws of 1672 it was provided that any person refusing to assist a constable in the execution of his office was to pay 10 shillings to the use of the country, to be levied by warrant of the magistrate before whom any such offender was brought. If any person "wilfully, obstinately or contemptuously" refused or neglected to assist any constable as aforesaid, he was to pay 40 shillings to the use of the country. The Book of the General Laws for the People within the Jurisdiction of Connecticut, p. 15 (1673). The same provision was carried over into later laws. Acts and Laws of His Majesty's Colony of Connecticut in New England, p. 20 (1702); id., p. 23 (1750); id., p. 23 (1769); Acts and Laws of the State of Connecticut in America, p. 23 (1784).

G. *Failure to Comply with Process*

1. By statute of March 6, 1962-3, non-appearance at court by a party duly summoned to appear subjected the defaulting person, in the absence of sufficient excuse, not only to arrest for the purpose of answering such contempt, but to a fine of 20 shillings and to "pay him

that is put off from a hearing that court his necessary costs for attendance." Public Records of the Colony of Connecticut, Vol. 4, (Charles J. Hoadley, 1868), p. 99.

2. The 20 shillings fine for such default was continued in the 1702 laws (Acts and Laws Col. Conn. (1702), p. 4) but it does not appear in later laws. For the form of the warrant of contempt see id., p. 41.

III. Contempt Cases Arising Under Colony and State Acts

A. *Defamation or Abuse of Court or Court Official.*

1. For accusing the County Court of Hartford of "oppression and opposeing a poore aged cripple", the General Assembly in May, 1677 sentenced George Phillips to a 5 pound fine and to disenfranchisement. Public Records of The Colony of Connecticut, Vol. 2 (ed. J. H. Trumbull, 1850), p. 307.

2. For "having defamed a sentence of the Court and one of its members and for having conducted himself in a "notorious lascivious and lewd carriage" towards a magistrate; sentenced to prison for 10 days, fined 5 pounds and ordered to give 10 pounds security for good behavior. Id., p. 269 (Particular Court, 1663).

3. For reviling the Assistants in their administration of justice, for reviling and threatening the Governor, and for threatening to burn houses; after indictment and a jury trial, defendant Thomas Robinson was found guilty and committed to jail during the court's pleasure, but for at least one month, and ordered to give bond of 100 pounds for his good behavior. Ms. Records of the Court of Assistants of Connecticut, 1665-1701, p. 95 (Court of Assistants, 1681) (Connecticut State Library, Hartford, Conn.; all the manuscript court records referred to below are at the same archives.)

4. For having accused one of the judges of the Hartford County Court with partiality in a case; fined 10 pounds. Id., p. 337 (Court of Assistants, 1701).

5. For having objected against the court as partial in staying a motion, and for having openly reflected upon the court as not being just to all persons; John Read, an attorney, was admonished and suspended from practice. Later, upon apology, he was readmitted as attorney. Ms. Judgment Book, Court of Assistants and Superior Court, 1687-1715, pp. 130, 133 (Court of Assistants, 1709).

6. John Rogers, upon hearing a judgment of the New London County Court against him and one John Jackson, declared that "the sentence was rebellious against her Majesty and that it was injustice in that the said Court were Rebells against her Majesty." Complaint being made to the Superior Court in September 1711 by an attorney for the crown that Rogers had violated the colony law against defamation of courts, Rogers confessed the matter of fact laid against him. The Court ordered that Rogers be fined 20 pounds current money, with costs of prosecution, and that he give a bond of 100 pounds current money with sureties for the peace and good behavior until the March sessions of the court. Rogers refused to give such bond and was imprisoned until March 1712 when the Court ordered him released, paying the sheriff his fees. Ms. Judgment Book, Court of Assistants and Superior Court, 1710-1749, pp. 21, 54.

7. Captain John Higbey was a plaintiff in a defamation action at a Superior Court held on March 12, 1712.

When a jury returned a verdict against him, Higbey in a contemptuous manner said to the Court, "I pray God deliver me from all your justice." The Court immediately ordered Higbey taken into custody. Asked why the Court should not proceed to sentence Higbey for his offense, the prisoner stated that "he supposed himself oppressed which was the occasion of his speaking in that manner." The Court thereupon disenfranchised Higbey and ordered him to give bond with sureties to the value of 50 pounds for his good behavior until the next Superior Court, to pay the charges of his present commitment and to stand committed until the sentence was fulfilled. Id., p. 50.

8. In March 1712-3, a crown attorney exhibited an information against one Phillip Read, a transient person, for reviling and abusing William Pitkin, a judge of the Superior Court, in connection with the shackling of Read when earlier imprisoned by a County Court order. These statements were made out of court and the information charged a violation of the law of the colony. The prisoner pleading not guilty, a petty jury found Read guilty of the charge. The Court sentenced Read to pay a fine of 10 pounds, to find sureties for the peace and good behavior and to pay the charges of the prosecution (3 pounds, 13 s.) and that he be committed to gaol until the sentence be performed. Id., p. 140.

9. In September 1713, John Collins was informed against for using "some Defamatory Expressions against the Court and Their proceedings"; brought before the court he acknowledged his folly. The Court sentenced Collins to pay a fine of 20 shillings and

charges of prosecution (1 pound, 6 d.) and stand committed until the sentence was fulfilled. Id., p. 160.

10. In March 1713/4, Sam Allyn was brought before the Court for "speaking diverse words tending to the Reproach and Defamation of the County Court at Hartford" and the members thereof. When Allyn pleaded not guilty and put himself upon the country, a petty jury brought in a verdict that defendant was guilty of saying he was fined for praying to God. The Court thereupon sentenced Allyn to pay a fine of 4 pounds and charges of prosecution (£ 3/3/7) and be committed until the sentence be fulfilled. Ms. Judgment Book, No. 1, Superior Court Records, 1715-18, sub March 1, 1713/4.

11. Sarah Bools [?] was committed to the New London gaol by mittimus for failing to find sufficient sureties in the sum of 100 pounds for her appearance at the September 1719 Superior Court to answer for her reflecting upon a Superior Court proceeding held at New London on August 5th by saying of one of the judges, "Now look to yourself for God's judgments will certainly come upon you (or quickly come upon you) for your unjust judgments for persecuting Gods people" and for her good behavior in the meantime. Brought before the Superior Court in September 1719, and asked whether she was guilty or not guilty of the crime for which she stood committed, she refused to make any plea. The Court then sentenced her to 2 months imprisonment and to pay the charge of her prosecution (£ 1/19/-) and to stand committed until the charge was paid. Ms. Judgment Book, No. 2, Superior Court Records, 1718-1721, sub September 22, 1719.

12. A presentment was made to a justice of the peace for New Haven County by the grand jurors of Waterbury that one Joseph Potter in March 1762 had defamed the proceedings of Thomas Matthews, Esq., a justice of the peace of the county, in a case brought before Matthews in which Potter was defendant, by saying the proceedings of Matthews in open court were "Devilish doings and the said Matthews was no better for a Justice than a Gander." Indicted in November 1762 in the Superior Court, Potter pleaded guilty and put himself on the mercy of the court. The Court sentenced Potter to forfeit 5 pounds lawful money and to pay the full cost and charge of his prosecution (£ 5/16/6 lawful money) and to stand committed until the judgment was complied with. Ms. Judgment Book, No. 14, Superior Court Records, 1760-1763, sub. February 22, 1763.

13. Zephaniah Swift in his *A System of Laws of the State of Connecticut,* Vol. II (1796), p. 373, made this comment on contempt in the State of Connecticut:

> "Contempts are openly to insult or resist the powers of a court, or abuse the persons of the judges, and from the very nature of the offence, it is necessary that the mode of proceeding should be summary and instantaneous, in order to defend the rights, and support the dignity of the court. The statute law provides that if any person or persons, upon examination or trial, for delinquency or any other person not under examination or on trial, shall either in words or actions, behave contemptuously or disorderly, in the presence of any court, it shall be in the power of the court, assistant or justice of the peace, to inflict upon them such punishment as they shall judge most suitable to the

nature of the offence, provided that no single minister of justice shall inflict any other punishment upon such offenders, than binding to the peace or good behaviour, to the next county court, putting them in the stocks, not exceeding two hours, or imposing a fine not exceeding thirty shillings.

"If any person insults the court, or any of its officers by abusive language, obstructs the business of the court, is guilty of any personal violence to any of the court, or any person present, or behave rudely, by making a disturbance, or is guilty of a breach of the peace, it shall be considered as a contempt in the face of the court, and they may instantly order such person to be apprehended, or if he leaves the court, may issue a warrant, and upon their own knowledge, may order such imprisonment to be inflicted upon him, as they think proper, pursuant to law. But tho all courts but assistants and justices of the peace, have an unlimited discretionary power, yet this cannot be deemed to authorize them to inflict capital punishment. It can be supposed to extend only to fine, imprisonment, or such corporal punishment as may be suited to the nature of the offence, and according to the principles of the common law.

"By the statute law, our courts have power to punish such contempts only, as are committed in face of the court, tho by the English law a great variety of acts done out of the court, have been considered as contempts, and attachments are issued to bring the offenders before the court: such as the misconduct of inferior magistrates, the oppression of sheriffs and gaolers, and the speaking contemptuously of courts; but I have never known an instance where the courts have attempted to pro-

ceed in a summary way against any contempts, but those committed in the face of the court.

"In addition to this it may be remarked, that by statute, courts have a power to inflict a fine not exceeding five shillings upon an attorney who shall transgress the rules of pleading appointed by court, or for notorious misbehavior and scandalous practices, may wholly suspend and displace them.

"By the common law, if a witness refuses to be sworn or examined, or prevaricates when sworn he may be punished for a contempt. So if a juror refuses to be sworn or to give a verdict, or is guilty of any misbehavior or irregularities, he may be punished for a contempt, and so may an attorney or party, who shall disregard and disobey the rules and orders of the court."

B. *Failure of Jurors to Attend Court*

1. For non-attendance at court as juror; fined 20 shillings and costs of prosecution of 1 pound, 7 shillings and 6 pence. Ms. Judgment Book, No. 8, Superior Court Records, 1741-1745, p. 86 (1742).

2. For non-attendance at court as juror; fined 20 shillings and costs of prosecution of 1 pound, 7 shillings and 6 pence. Id., p. 171 (1742/3).

IV. Extension of Laws of England To Colony or State

1. Swift, in A System of the Laws of the State of Connecticut, Vol. 1, pp. 40-47 (1795), takes the view that the greatest part of the common law of the State derived from the common law of England. He states among other things:

"At the late revolution, when we were separated from the British empire, the general consent and approbation of the people, established the common law of England, as far as it is warranted by reason,

and conformable to our circumstances, to be the law of the land."

Cf. the view of Root, Reports, Vol. 1, Preface, pp. iii-xv, where he criticizes "the mistake of those who suppose that the rules of the common law of England are the common law of Connecticut, until altered by a statute."

2. In *Fitch* v. *Brainerd,* 2 Day 163 (1805), one of the leading reception cases in Connecticut, the Supreme Court of Errors stated (at p. 189):

> "For though the common law of England hath not, *as such,* nor ever had, any force here; yet, in the progress of our affairs, whatever was imagined at the beginning, it long since became necessary, in order to avoid arbitrary decisions, and for the sake of rules, which habit had rendered familiar, as well as the wisdom of ages nurtured, to make that law our own, by practical *adoption*—with such exceptions as a diversity of circumstances, and the incipient customs of our country, required."

V. Contempt Cases Arising Under Common Law and Usage

A. *Defamation or Abuse of Court or Court Official*

1. For using "contemptuous words against the orders of Court," among other things; sentenced to be whipped and bound to good behavior. Records of the Particular Court of Connecticut, 1639-1663, Collections of the Connecticut Historical Society, Vol. 22 (1928), p. 5 (1639).

2. For having told the Hartford County Court, "amongst other discourses", that they had given the constable of Wethersfield a license to lie; fined 5 pounds. Ms. Judgment Book, Court of Assistants and Superior Court, 1687-1715, p. 11 (Court of Assistants, 1691) (Connecticut State Library).

3. For having presumptuously said that he defied the Governor and all the Assistants and ministers, and that they were "Devill Worshippers" (and refusing to retract the same); John Rogers was sentenced to be "severely whipt." Id., p. 28 (Court of Assistants, 1694).

4. In August 1727 Isaac Clark exhibited in Court an insolent and scandalous writing. He was sentenced to become bound in a recognizance of 50 pounds until the Superior Court of February next and to pay costs of prosecution (£ 1/14/10). At such time he was released from his bond and cleared by proclamation. Ms. Judgment Book, No. 5, Superior Court Records, 1727-1730, sub. Fairfield, August 27, 1728 and February 25, 1728/9.

B. *Misconduct in Court*

1. For having made "irregular speeches in Courte", fined 10 shillings. Records of the Particular Court of Connecticut, 1639-1663, Collections of the Connecticut Historical Society, Vol. 22, p. 59, March 1648 (Particular Court).

2. For "Contemptuous Carrage in the Courte"; committed to prison for an unspecified length of time. Id., p. 60, May 1654 (Particular Court).

3. For "Contemptuous Carrage against the Courte and Magistrates"; fined 40 shillings and imprisoned for one day. Id., p. 152, September, 1655 (Particular Court).

4. For disorderly carriage in court by two persons; each fined 10 shillings. Id., p. 187, March, 1657 (Particular Court).

5. For having spoken without leave and for having behaved in a disorderly manner; John Rogers fined 5

pounds. Ms. Records of the Court of Assistants, 1665-1701, p. 265 (Court of Assistants) (Connecticut State Library).

6. For having "lock[ed] himself up in the Court chamber and thereby shutting out the Court and forcing them to wait long before they could attend her Majesties Service"; fined 10 shillings and committed to prison for having refused to give bond of 10 pounds for good behavior, and there to remain until delivered by order of law. Ms. Judgment Book, Court of Assistants and Superior Court, 1687-1715, p. 31 (Court of Assistants, 1704).

7. John Rogers, Sr. coming into Court and "behaving himself in a furious raving manner with mighty crying and tumultuous noise" and it being certified to the Court that Rogers was endeavoring to gather people together to baptize them, the Court ordered him confined in a dark room at the gaol until it appeared to either judge of the court that he was cured of his distraction or his friends procured sufficient bonds for safe keeping. Ms. Judgment Book, Court of Assistants and Superior Court, 1710-1749, p. 53 (1712).

8. Henry Merrill rudely crowding himself upon the Court, the Court observed that he was so engulfed with strong drink as to be much bereaved of his understanding and fined him 6 shillings, 8 pence. Id., p. 97 (1712).

9. Nathan Clark, brought before the Court for quarrelling and breaking the peace in the street before the Court and being convicted of drunkenness, cursing and swearing and striking the constable, was sentenced to pay a fine of 5 pounds and the charge of prosecution and find securities for his good behavior until the Su-

perior Court in March next and to stand committed until the sentence was fulfilled. Id., p. 164 (1713).

10. Joshet Mansfield "speaking and behaving himself contemptuously" before the Court and it appearing that Mansfield was a "person of ill name and fame", the Court ordered him to give bond of 20 pounds with sureties for his good and peaceable behavior until the Superior Court in March next and to pay the charge of his prosecution (£ 1/5/6) and to stand committed until the sentence was performed. Id., p. 168 (1713).

C. *Failure to Perform Official Duties*

1. For failing to execute two warrants; a constable not putting himself on the country but submitting to be tried by the court, was fined 4 pounds and fees of prosecution, standing committed until the sentence was performed. Records of the Particular Court of the Colony of Connecticut, 1687-1688 (1935), p. 22 (Particular Court, 1688).

2. For failure by sheriff to bring into court a prisoner charged with counterfeiting; sheriff amerced 500 pounds lawful money. Ms. Judgment Book, No. 20, 1782-1784, Superior Court Records, September 1782.

D. *Failure to Comply with Process*

1. James Prentis and Samuel Rogers, brought before the Court of Assistants for "scornfull abuse and contempt" of a writ signed by the Governor and opposing the constable in his execution thereof, after examination were bound over to the County Court at New London where they were fined 5 pounds apiece. Ms. Judgment Book, Court of Assistants and Superior Court, 1687-1715, p. 72 (1707).

E. *Failure to Obey Court Rules or Orders*

1. For apparent failure to obey a court order and for having caused a party to bring in many unnecessary witnesses; fined 20 shillings on the first default and 10 shillings on the second. The Public Records of the Colony of Connecticut, Vol. 1 (ed. J. H. Trumbull, 1850), p. 44 (Particular Court, 1639).

2. Ebenezer Spencer, keeper of the Hartford gaol, refusing to bring an Indian prisoner before the Court, that body ordered Spencer arrested, relieved of his duties, and secured until he gave bond for his appearance; when Spencer appearing, confessed his fault and asked for pardon, the Court ordered that if Spencer became bound with sureties for 100 pounds for his good behavior and trust in his office, he would be restored to office. Ms. Judgment Book, Court of Assistants and Superior Court, 1687-1715, p. 207 (Court of Assistants, 1711).

3. In *Barker* v. *Wilford* there is dictum that it is contempt to withhold the files of the court after a rule has been issued to bring the files into court. Kirby's Reports, 1785-1788, 232, 234 (Superior Court, 1787).

4. In *Allen* v. *Broom* there is dictum that if one designedly carried off the files of the court, he ought to be proceeded against by way of contempt. Kirby's Reports, 1785-1789 (1933 Supplement), p. 11 (Superior Court, 1786).

DELAWARE

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I. Judicial Establishment

The territory constituting the State of Delaware originally consisted of lands on the Delaware conquered

by the English from the Dutch in 1664 and included within the royal grant to the Duke of York. While English laws were extended to this area c. 1672, it was not until 1676 that Governor Andros of New York introduced the so-called Duke of York's Laws and established courts at New Amstel (later Newcastle), Upland (later Chester) and Whorehill (later Lewes). A fourth was established at St. Jones in 1680. The Upland district became part of the royal grant to William Penn of the Province of Pennsylvania in 1681; in 1682 by petition of the inhabitants the Newcastle, Whorehill and St. Jones districts were annexed to the Province of Pennsylvania as "territories thereunto belonging." They later became known as the three Lower Counties on the Delaware (Newcastle, Kent and Sussex) in contradistinction to the upper counties of Bucks, Philadelphia and Chester and at a still later stage, after a separate legistature was set up in 1701, as the Government of Newcastle, Kent and Sussex on the Delaware. During the colonial period the significant courts for the Delaware area were the three county courts—exercising jurisdiction under various names such as Courts of Common Pleas, Courts of General Sessions, Courts of Equity and Orphans' Courts. Until 1701, at least, the Provincial or Supreme Court of the Province of Pennsylvania exercised appellate jurisdiction over the three county courts and possibly some original jurisdiction in the area. It was not until 1726 that a Supreme Court and a Court of Oyer and Terminer was established for the three counties by act of Assembly. The extant records of the Supreme Court are fragmentary and its significance in the administration of justice slight. At the Revolution the only change made in the judicial system was the substitution of a Courts of Appeals in lieu

of the appeal to the King in Council in England. The research in Delaware included examination of the extant records of the Supreme Court and the County Courts for Kent, Sussex and Newcastle.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. An act passed during Governor Keith's administration (1716-26) authorized the justices of the Orphans Courts to issue attachments for contempt against persons making default in appearance when summoned and to force obedience to their warrants, sentences and orders concerning any matter or thing cognizable in said courts by imprisonment of body, or sequestration of lands or goods, as fully as any court of equity might or could do. Laws of the State of Delaware (1797), Vol. 1, p. 92.

2. The 1726 act establishing the Supreme Court empowered the judges, or any two of them, to "examine, correct and punish the contempts, omissions, and neglects, favours, corruptions and defaults of all or any of the Justices of the Peace, Sheriffs, Coroners, Clerks and other officers" within the several counties. It also empowered the Court of Equity "to force obedience to their decrees in equity, which may be by imprisonment of bodies, or sequestration of lands." Laws of the State of Delaware, Vol. 1, pp. 125, 131 (1797).

B. *Defamation or Abuse of Court or Court Officials*

1. The Duke's Laws provided that, "whosoever shall speak in Derogation of the Sentence or Judgment of any Court, shall be fined at the Discretion of the next Court of Sessions or Assizes," the warrant to be issued

by the clerk. Charter to William Penn, and Laws of the Province of Pennsylvania, Passed Between the Year 1682 and 1700, Preceded by the Duke of York's Laws in Force from the Year 1676 to the Year 1682, p. 21 (1879).

2. The Great Law or the Body of Laws of December 7, 1682, provided (c. 22) that anyone who assaulted or menaced a magistrate, and was duly convicted thereof, was to be fined "according to the nature of the fact" and committed to the house of correction at hard labor for one month. Charter and Laws Prov. Pa., p. 113. This was one of the laws put into execution by Governor Fletcher in June 1693. Id., p. 197.

3. The Great Law or Body of Laws of December 7, 1682, also provided (c. 29) that anyone who spoke slightingly of or carried himself abusively against any magistrate or person in office, upon due conviction, was to be punished according to the quality of the magistrate and nature of the offense, but not less than 20 shillings or 10 days' imprisonment at hard labor in the house of correction. Id., p. 115. In 1693 the minimum was changed to 5 shillings and the maximum to 50 shillings. Id., p. 227. As to the meaning of "due conviction" in the discussion of the phrase "lawfully convict" in a Massachusetts Bay law *infra,* p. 116.

4. A law of March 10, 1683-4, provided that if any person spoke in derogation of the sentence or judgment of any court, they were to be fined at the discretion of the courts. Id., p. 130. This was one of the laws put into effect by Governor Fletcher in June 1693. Id., 204.

5. By statute of November 27, 1700, any person who spoke "rudely anything in derogation of any sentence or judgment" given in any court of record or who "shall

misbehave himself in the said courts during the sitting thereof", was to be fined at the court's discretion not exceeding 40 shillings. Statutes at Large of Pennsylvania, 1700-1712, Vol. 2, p. 45. Disallowed by the Queen in Council, Feb. 7, 1705-6.

6. A statute enacted between 1726 and 1736 provided that any person who wrote or spoke anything in derogation of any sentence or judgment given in any court of record, by saying such sentence or judgment was given corruptly, partially or unjustly, "and being thereof legally convict", was liable to a forfeiture of a sum of money not exceeding five pounds, of which half was to go to the informer and the other half to the support of the government. Laws of the State of Delaware (1797), Vol. 1, p. 120. As to the meaning of "legally convict" see also the discussion of the phrase "lawfully convict" in a Masachusetts Bay law *infra*, p. 116.

7. A 1740 act provided that any person taken or arrested by warrant, order or command of any court or justice of the peace who should use any abusive, reviling or threatening speeches against such court or justice, or resist or assault the person executing such warrant or order, and be thereof convicted, was to be deemed a breaker of the peace and fined in a sum not exceeding 5 pounds. In case the party aggrieved, resisted or assaulted sued such offender, he was to recover treble damages and the party offending was to be bound to his good behavior. Laws of the State of Delaware, Vol. 1, p. 174 (1797).

8. A 1752 statute provided for fines at the discretion of the court for anyone "duly convicted" of having menaced, assaulted or beaten any magistrate or justice

of the peace of "this government, in the execution of his office." Id., Vol. 1, p. 306.

C. *Misconduct in Presence of Court*

1. The Duke of York's Laws provided as to holding of courts of sessions that the cryer or sheriff was to make proclamation in a certain form, such form reading *inter alia,* "Silence is commanded in the Court whilest his Majesties Governor Counsel and Justices are Sitting upon pain of Imprisonment." Charter and Laws Prov. Pa., p. 21. A similar form appears in the laws made on March 10, 1683-4. Id., p. 128.

2. An act passed between 1726 and 1736 authorized any court of record to impose a fine not to exceed five pounds upon the commission of any "rudeness" or "misdemeanour" during the court sessions. Laws of the State of Delaware (1797), Vol. 1, p. 120.

D. *Failure of Jurors to Attend Court*

1. An addition to the Duke of York's Laws provided that any person nominated to serve on a jury who refused to serve without just cause was to forfeit 20 shillings to be levied by the constable. Charter and Laws Prov. Pa., p. 59.

2. A May 1685 law provided that any person duly summoned to serve on a jury in any court and neglecting to attend was to be fined not exceeding 10 shillings. Id., p. 176. Substantially the same provision was re-enacted in 1693 and 1700. Id., pp. 215-16.

3. A statute enacted between 1726 and 1736 provided for a forfeiture of not exceeding twenty shillings for the neglect or refusal to serve on any jury by anyone duly

summoned to serve unless reasonable excuse were made. Laws of the State of Delaware (1797), Vol. 1, pp. 116-17. The provision was incorporated by reference in id., Vol. 1, pp. 241-42.

4. A 1770 statute provided for a fine not exceeding forty shillings for neglect or refusal on the part of any duly summoned grand or petit juror to attend the Supreme Court or any Court of Oyer and Terminer and General Gaol Delivery; and for a fine not exceeding thirty shillings for a similar neglect or refusal to attend any County Court. Id., Vol. 1, p. 473. In 1793 the fine was altered to not exceeding $10 nor less than $3 as the court should think proper to inflict. Id., Vol. 2, p. 1074.

5. A 1779 statute relating to determining disputes as to forfeited lands imposed a fine not exceeding 5 pounds on any juror summoned to a Court of Common Pleas in such a proceeding and refusing or neglecting to appear. Id., Vol. 2, pp. 659-60.

E. *Failure of Witnesses to Appear and Testify*

1. The Duke of York's Laws provided that a witness subpoenaed and not appearing at a court of sessions was to be fined 20 shillings and, in the case of the Court of Assizes 40 shillings, or such other fine or punishment as should be adjudged by the court for damage done to the cause by his non-appearance, provided the non-attendance was not attributable to an act of God. Charter and Laws Prov. Pa., p. 7.

2. By a law of May 10, 1690, a witness who neglected to appear at any court upon summons was to be fined at the discretion of a quorum of justices for the benefit of the party wronged. Id., p. 183.

3. By a 1700 law crown witnesses who failed to appear in criminal cases, after having been duly summoned, were to be fined at the discretion of a quorum of justices, the fines to be for the benefit of the aggrieved party. Pa. Stat. at Large, 1700-1712, Vol. 2, p. 47. Disallowed by the Queen in Council, Feb. 7, 1705-6.

4. A statute enacted between 1726 and 1736 provided that a witness who refused to appear and give evidence was liable to a fine not exceeding forty shillings "for such * * * contempt" and, in addition, was liable for all damages suffered by the party injured as a result of the failure to appear. Laws of the State of Delaware (1797), Vol. 1, p. 99.

5. A 1779 act relating to determination of disputes with respect to forfeited lands provided that any witness who refused or neglected to appear or to testify after appearance was to be fined in an amount not exceeding 50 pounds and to be committed to gaol until he agreed to testify. Id., Vol. 2, p. 660.

6. A 1787 act authorized auditors of the State, in case a witness refused to appear or to disclose his knowledge, to issue process of contempt and commitment "as is usual in the Courts of Law within this state." Id., Vol. 2, p. 871.

F. *Refusal to Assist Court Officers*

1. The Duke of York's Laws provided sub Constables as follows:

"And if any person shall refuse to assist any constable in the execution of his office * * * they shall pay for neglect thereof ten shillings to the use of the Town of which he is constable to be levyed by warrant from any

Justice before whom such offender shall be brought and if it appears by good testimony that any shall wilfully or contemptuously refuse or neglect to assist any constable as is before expressed, he shall pay to the use aforesaid forty shillings." Charter and Laws Prov. Pa., p. 22.

G. *Refusal to Serve as Court Officers*

1. An addition to the Duke's Laws provided that any person duly elected who refused to serve in the office of constable was to forfeit 5 pounds. Charter and Laws Prov. Pa., p. 63.

H. *Failure to Perform Official Duties*

1. An addition to the Duke of York's Laws provided that any justice of the peace or high constable who was absent from the sessions in his riding or from the General Court of Assizes was to pay 10 pounds for every day's absence and every constable for each default 5 pounds. Charter and Laws Prov. Pa., p. 60.

2. A May, 1685 law provided that all justices of the peace attend every county court within their respective places under penalty of any sum not exceeding 30 shillings. Id., p. 176. This law was abrogated in 1693.

3. A 1693 law re-enacted in 1700 provided that a sheriff neglecting to summon a sufficient number of freemen to serve as jurors in the ordinary courts of justice was to be liable to pay double damages to the party aggrieved. Charter and Laws Prov. Pa., p. 214; Statutes at Large Pa., 1700-1712, Vol. 2, p. 132.

4. An act, c. 1742, provided that a sheriff refusing or neglecting to summon and return jurors, so that justice

was delayed, was to be fined not exceeding 100 pounds and committed until paid and to be disabled from holding the office for 3 years. Laws of the State of Delaware (1797), Vol. 1, pp. 241-42.

5. A 1770 law provided that if any constable refused to execute any legal precept directed to him by a justice of the peace or was guilty of any breach of duty or neglect of office and convicted thereof, he was to forfeit not exceeding 5 pounds. Laws of the State of Delaware (1797), Vol. 1, pp. 478-79.

6. Acts of 1742, 1770 and 1792 provided for a forfeiture of twenty or thirty shillings upon the neglect or refusal by any legally summoned arbitrator (or auditor) or referee to hear and determine the matter in controversy. Laws of the Government of New-castle, Kent and Sussex upon Delaware, p. 169 (1741); Laws of the State of Delaware (1797), Vol. 1, p. 474, and Vol. 2, pp. 1043-44.

7. A 1787 statute authorized auditors of the State, in case a sheriff, coroner or other officer refused to execute precepts or writs issued by the auditor, to amerce such delinquent "as in the said Courts of Law it is used and practised." Such amercements were to be recoverable in an action of debt in a Court of Common Pleas or in the Supreme Court. Id., Vol. 2, pp. 871-72.

8. A 1796 statute provided for the imposition of a fine not to exceed twenty dollars for any neglect or refusal by a duly appointed constable to attend the meetings of the "Commissioners [of the tax], and the Commissioners of the Levy Court and Court of Appeals of their county respectively" or to obey the orders of such

bodies. Laws of the State of Delaware (1797), Vol. 2, p. 1258.

I. *Failure to Comply with Process*

1. A 1793 statute provided that a sheriff or other custodian who failed to make return to or disobeyed a writ of habeas corpus was made "incapable to hold or execute his said office" and, in addition, was to forfeit to the aggrieved party the sum of $300 for the "first offense" and $600 for the "second offense." Laws of the State of Delaware (1797), Vol. 2, p. 1060. The statute also provided for the same penalties upon refusal by any sheriff or custodian to whom a writ of habeas corpus had been directed to fail or refuse to deliver to the prisoner or one on his behalf a true copy of the warrant of commitment and detainer of such prisoner.

III. Contempt Cases Arising Under Colony and State Acts

A. *Misconduct in Court*

1. On March 12, 1700, a Kent County court ordered that one Richard Murrough be discharged from the sheriffs' custody, where he had been placed earlier "for his rude behavior" to the court. Court Records of Kent County, Delaware, 1680-1705, p. 154 (American Legal Records—Vol. 8, 1959).

2. In April 1702, the Court of Quarter Sessions for Kent County fined one William Nickolls ten shillings "for his Contempt in Court" and ordered the sheriff to keep the defendant in custody until the fine and court costs had been paid in full and security of 100 pounds for his good behavior until the next Quarter Sessions had been provided. Id., p. 201.

3. On May 9, 1704, a court in Kent County fined one Gabriel Jones five shillings "for swearing in Court." Id., p. 282.

B. *Failure of Jurors to Attend Court*

1. Entries in the 1680 records of the Sussex County Orphans' Court Book reflect that two individuals were fined 150 pounds of tobacco each for failing to attend as jurors. Ms. Sussex County Orphans' Court Book, 1680-1699, p. 4 (this volume and the other manuscript court records referred to below are at the Delaware State Archives, Dover, Del.).

2. In 1686, the Sussex County Orphans' Court fined two persons five shillings each for non-attendance or lack of punctual attendance for jury service; a third man was fined 10 shillings for "refusing to come into the Court to give in his verdict and for contempt to the Court viz refusing to come when the Court sent the Constable for him." Id., 1680-1699, pp. 77, 174.

3. Entries appearing in the Sussex County Orphans' Court Book reflect that between 1688 and 1695 five persons were fined five or ten shillings each for refusal to attend or properly perform their duties (*i.e.*, refusal to return a verdict) as jurors. Id., 1680-1699, pp. 184, 681, 701, 703.

4. In December 1698, the Kent County Court of Quarter Sessions fined two persons ten shillings each for their contempt in refusing to serve as jurors and ordered fifteen others to appear at the next court "to shew reasons for their default" in failing to appear as jurors after having been duly summoned. Court Records of Kent County, Delaware, 1680-1705, p. 131. The court

also ordered that two others be summoned to the next Court "to answere such things as shall be objected against them on his Majesties behalfe they now makinge default upon the last summons against them to this Court." Ibid.

5. On September 12, 1699, a Kent County Court fined two men five shillings each for failing to attend the court as petit jurors. Id., p. 137.

6. On December 12, 1699, a Kent County Court fined each of five men two shillings and sixpence for failing to attend the court as petit jurors. Id., p. 146.

7. In 1700, a Kent County Court fined one Mark Manlowe nine shillings and costs for his refusal in open court to serve on a jury. The court ordered that ten other persons "be summoned to answere" at the next court for their failure to appear as jurors after having been duly summoned by the sheriff to appear. Id., p. 160. On September 10, 1700, the court "remitted their offense" after having heard their reasons for their absences. Id., p. 167.

8. On July 9, 1700, a Kent County Court fined one Benjamin Dobbs ten shillings "for his Contempt in denying to Serve upon the Jury" and ordered the sheriff to take him into custody until he paid the fine together with costs. Id., p. 161.

9. On June 10, 1701, a Kent County Court fined one Luke Manlowe ten shillings for not attending as a juror and ordered the sheriff to take him into custody until the fine and costs be paid. Id., p. 182.

10. In November 1703, the Kent County Court of Quarter Sessions ordered that six persons who failed to appear for jury service appear at the next quarter ses-

sions in the county for the purpose of answering such conduct. Id., p. 269. The court subsequently ordered two of these persons discharged without having to pay any fees, and, upon a finding that the four others and an additional party (one Francis Hirons) failed to show satisfactory reasons for their non-attendance, ordered them "to pay full Fees to the Sherriffe and Clerk for theire Contempt as afforsaid." Id., p. 275.

11. On May 9, 1704, the Kent County Court fined two men five shillings each for failing to attend as petit jurors when called. Id., p. 283.

12. In August 1705, the Kent County Court ordered that ten persons summoned for grand jury service and six summoned for petit jury service be summoned to appear at the next court to be held in the county to answer for their contempt in refusing to attend as jurors. In addition, the court imposed a fine of ten shillings on one Samuell Burbery who "Being Present in Court" and without just cause refused to serve as a grand juror. Id., p. 319. Subsequently, the court fined five of the defaulting grand jurors ten shillings each; two defaulting grand jurors six shillings each; and two defaulting petit jurors ten shillings each and costs. Id., p. 331.

13. In February 1765, the Sussex County Court fined a number of jurors 57 shillings each for non-attendance at the court, together with "costs to the Sheriff for Such Demand." Ms. Sussex Court of Quarter Sessions and Common Pleas Docket—Feb. 1765—Nov. 1765, p. 44.

14. In February 1783, the Court of Quarter Sessions for New Castle County fined one John Hall five shillings for non-attendance as a petit juror and ordered that he

stand committed until the same was paid. File marked NC Court (1780 Feb.—1783 Feb.) Quarter Sessions—Pleas (incomplete), Quarter Sessions, Feb. 1783.

IV. Extension of Laws of England to Colony or State

1. The 1726 act (An Act for the establishing Courts of Law and Equity within this Government) establishing the Supreme Court provided *inter alia* that such court "generally shall minister Justice to all Persons, and exercise the Jurisdictions and Powers hereby granted them, concerning all and singular the Premises according to Law, as fully and amply to all Intents and Purposes whatsoever, as the Justices of the Courts of King's-Bench and Common-Pleas at Westminster, or any of them, may or can do upon writs of Error and other remedial Writs issuing out of the said Courts." The act also empowered the justices in connection with the criminal jurisdiction granted over felonies of death "to issue forth such necessary Precepts and Process, and force Obedience thereto, as Justices of Assize, Justices of Oyer and Terminer and Gaol-Delivery, may or can do in the Realm of Great-Britain." Laws of the State of Delaware (1797), Vol. 1, pp. 376, 378.

2. The Delaware Constitution of 1776, Article 25, provided:

> The common Law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future Law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, etc.,

agreed to by this convention. [1 Laws of the State of Delaware (1797), Vol. 1, Appendix, p. 89.]

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempts.*

1. In 1680, the Sussex County Orphans' Court fined a certain person 500 pounds of tobacco for "keeping the books and Records soo that the court and Courthous waited for him near halfo a day for him to Com." Ms. Sussex County Orphans' Court Book, 1680-1699, p. 4.

2. In 1680, the Kent County Court fined six persons five hundred pounds of tobacco each, together with costs, for contempt in that they "in a Riotous manner publicqly pluke upp and bare a way the stocks." Court Records of Kent County, Delaware, 1680-1705, p. 3.

B. *Defamation or Abuse of Court or Court Officials*

1. In January 1678, the New Castle County Court ordered one Henry Salter to pay 100 gilders in reparation for his having slandered the court and otherwise remitted his "fault." Before judgment, the court expressly took into consideration the defendant's age, "sikness" and "humble submission" acknowledging his "fault and Errour." Records of the Court of New Castle (1904), Vol. 1, p. 287.

2. In July 1678, the New Castle County Court fined several persons 600 gilders, plus costs, for their contempt in slandering justices of the court. Id., pp. 226-230.

C. *Misconduct in Court*

1. In 1680, the Sussex County Orphans' Court fined eight men fifty pounds of tobacco each for smoking

tobacco in the court. Ms. Sussex County Orphans' Court Book, 1680-1699, pp. 4, 12, 21.

2. Entries appearing in the Sussex County Orphans' Court records reflect that between 1687 and 1697, six men were fined five shillings each for either using "peremptoric language" in the presence of the court or for "swearing" "by God" or "by his faith" in the presence of the court. Id., pp. 174, 702, 703, 71[illegible] 716.

3. On September 12, 1699, three men were fined one shilling each by a Kent County Court for smoking in court. Court Records of Kent County, Delaware, 1680-1705, p. 139.

4. On June 10, 1701, Kent County Court fined one Thomas Sandland one shilling for smoking in court. Id., p. 184.

5. On May 9, 1704, Kent County Court fined two men 1 shilling each for smoking in court. Id., p. 283.

6. In May 1707, the court of Quarter Sessions of Kent County discharged one John Jones from the sheriff's custody upon his "submission" for "abusing" one of the justices of the court. Ms. Court Record Book 1703-1717, p. 62.

7. In May 1718, the Court of Quarter Sessions of Kent County "Discharged" one John Weakon from a complaint that he had used "several Reflecting and Reproachful Words" toward several of the magistrates of the court. The condemnor had admitted that he had been "Guilty of Foure Indiscreet Expressions" but that they were not intended to be applied to the magistrates and had introduced evidence of his past "Civil Behavior" and "more Especially toward the Magistrates

of this County In General." Ms. Court Record Book, March 8, 1718, and September 1722, p. 3.

8. In February 1718/9 the Court of Quarter Sessions for Kent County, after having heard a submission and apology by one Christopher Topham for having falsely slandered one of the justices and for having behaved before the court in a "Rude unmannerily and Tumultous Manner", fined him "only Twenty Shillings, and [ordered] that he be Committed until the same together with his fees are satisfied." Ms. Court Record Book, 1718-1721, p. 21.

9. In 1722, the Court of Quarter Sessions for Kent County fined one William Newall five pounds for "Menacing and treating the Magistrates of this Bench in General and particularly Judge Gordon with very serious and abusive Language" and ordered that he be committed until the fine and costs be paid. The court also "Convicted" the defendant for "Swearing to profane oaths and being Drunk" and fined him fifteen shillings. Ms. County Court Record Book, 1722-1723, p. 37.

10. In February 1733-1734, the Court of Quarter Sessions of Sussex County fined one John Simonton forty shillings "for several gross abuses to the Magistrates in Cort sitting", together with five pounds for "other abuses to the Magistrates while in Court Sitting" and five shillings for "Drunkeness". Ms. Sussex County Orphans' Court Book, May 1733-August 1736, pp. 24-25.

11. In August 1736, the Court of Quarter Sessions of Kent County, upon presentment of two defendants "for speaking in Derogation of the Magistrates", ordered that they be committed until they gave security in the sum of 50 pounds and in the meantime to be of good

behavior. Each of the defendants provided the necessary security. Ms. County Records Docket Book, 1736-1785, p. 19.

12. In November 1780, the Court of Quarter Sessions of New Castle County discharged one Joel James upon payment of his fees for "insulting" a particular magistrate of the county in the execution of his office and ordered the defendant to stand committed until the same were paid. Delaware State v. Joel James and Benjamin Harley, in file marked NC Court, 1780 Feb-1781, Nov. Quarter Sessions Docket.

13. In August 1783, the Court of Quarter Sessions of New Castle County discharged a defendant on recognizance for "reviling and vilifying the Magistry of this County" upon paying his fees and committed him until the same were paid. Ibid.

14. On May 5, 1786, the Orphans' Court for Sussex County fined a sheriff thirty shillings "for his contempt and insult and for refusing to deliver up certain papers." Ms. Sussex County Orphans' Court Book, March 1786-August 1789, p. 79.

D. *Failure of Witnesses to Appear or Testify*

1. On March 8-9, 1681, the Sussex County Orphans' Court fined one Thomas Morgan 150 pounds of tobacco "for his Contempt presumptously and wilfully refusing to give his testimony when required by the court in a [particular] cause." Ms. Sussex County Orphans' Court Book, 1680-1699, p. 23.

E. *Failure to Perform Official Duties*

1. In June 1678, the New Castle County Court imposed a $10.00 fine upon Walter Wharton for failing

to appear and perform his duty as a justice in such court. Records of the Court of New Castle (1904), Vol. 1, pp. 210-211.

2. On March 13, 1687, the Sussex County Orphans' Court "lowered" to five shillings a fine earlier imposed on one Francis Williams for "his disobedience" upon the promise of Williams "to performe his duty to ye Court and Governor for the future." Ms. Sussex County Orphans' Court Book, 1680-1699, p. 175.

3. On June 15, 1698, a Kent County Court fined one Isack Hill, constable for the Dover hundred, five shillings for "Not givinge his attendance at the Court." Court Records of Kent County, Delaware, 1680-1705, p. 119.

4. On September 12, 1699, a Kent County Court fined two constables ten shillings each "for not givinge their Attendance to the Court." Id., p. 137.

5. In 1704, a Kent County Court ordered that one John Clayton, constable of Little Creek hundred, be committeed to the sheriff's custody until he "Should answer for some Misdemeanors by him Committed." Brought before the court, he "departed the Court without License." Upon his return to court, the Court fined him five shillings for being intoxicated, five shillings "for his Contempt to the Court . . . and for his Contemning the Sheriff Custody untill the said fines and the officers Fees be payed And untill he find Security for his good behavior and Appearance at next Court." Id., p. 312.

6. In December 1709, the Court of Quarter Sessions for Kent County fined two constables five shillings each

"for their absence And contempt in nott attending this Court when called." Ms. Court Record Book, 1703-1717, p. 82.

7. Between 1744 and 1746, the Court of Quarter Sessions for Sussex County fined Constable Edward Burroughs ten shillings for non-appearance but later remitted the fine "for Reasons Showed to the Court." File marked, Sussex—Court of Quarter Sessions Docket —November 1744, August 1746, p. 164. At the February 1744 session of the same court, three constables were fined ten shillings each "for Non Attendance", but two constables were "Excused." Id., p. 183.

F. *Failure to Comply with Process*

1. In 1681, the Kent County Court fined one Edward Parke five hundred pounds of tobacco upon his failure to appear in court after having been summoned. Court Records of Kent County, Delaware, 1680-1705, p. 46.

G. *Failure to Obey Court Rules or Orders*

1. In April 1679, the New Castle County Court fined one Ralph Hutchinson 150 gilders for failing to obey a court order that he bring before the court a certain pregnant maid servant. Records of the Court of New Castle (1904), Vol. 1, p. 320.

2. In 1680, the court fined a certain party for apparently writing something "contrary to an order of Court." Ms. Sussex County Orphans' Court Book, 1680-1699, p. 4.

3. On December 12, 1700, the Kent County Court ordered that one John Burton be "dismist, paying the fees" for "his Contempt in not wearing the badge of a

Romane T according to Law" when he appeared, pleaded ignorance and promised for the future to comply with the law. Court Records of Kent County, Delaware, 1680-1705, p. 154.

4. On November 13, 1739, the Court of Quarter Sessions of Kent County ordered the commitment of one James Wills "till he comply with the Order of the last Court for the Maintenance of a Bastard child begotten on the Body of Catherine Ryan." File marked 1738 Oct.-1742 Nov. Quarter Sessions Proceedings.

5. On June 11, 1790, the Orphans' Court for Sussex County ordered that a defendant in a certain suit be attached for "not appearing" as ordered by the court. Orphans' Court file marked, Sept. 1789-Sept. 1743, p. 35.

GEORGIA

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I. Judicial Establishment

In proprietary Georgia, chartered in 1732, the Town Court at Savannah was the only important judicial body. During the period of royal government the General Court of Pleas, established in 1754, the year royal government commenced, exercised original jurisdiction in civil causes; the Court of Session of Oyer and Terminer and General Gaol Delivery, also established in 1754, had cognizance of criminal matters. The Governor and Council, as a Court of Errors, exercised appellate jurisdiction over the General Court and the Court of Session of Oyer and Terminer in accordance with the royal gubernatorial instructions (£300 minimum for appeals in civil actions, £200 minimum in misdemeanors). Apparently none of the original records of the Town Court, the General Court of Pleas, the Court of Session of Oyer and Terminer or the Court of Errors are extant. The Georgia Constitution of 1777 provided

(1) for the establishment of a Superior Court in each county with original jurisdiction in criminal and in most civil matters and (2) the continuance in the counties of courts of conscience with limited jurisdiction in civil matters. The constitutional provision was implemented by an act of 1778. In 1789 by legislative act the original jurisdiction of the Superior Courts in civil matters was reduced and inferior county courts and justice of the peace courts established, both the latter having limited jurisdiction in civil actions. No attempt was made to examine the records of the Superior Courts as the information available indicated that minute books of the Superior Courts for the period prior to 1790 had survived in only two counties (Chatham County, from 1782, Franklin County, from 1785).

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. A 1789 act (An Act for Regulating the Judiciary Departments of this State), in Section VI thereof, obviously derived from Section 17 of the Judiciary Act of 1789, gave the judges of the Superior Courts, *inter alia*, power "to punish, by usual fines or imprisonment, at the discretion of the judge or judges presiding, all contempts of authority in any cause or hearing before the civil court." Digest Laws State Georgia, pp. 389, 392. A 1792 act (An Act to Revise, Amend and Consolidate the Several Judiciary Acts of this State), repealing the 1789 act, continued in Section IX thereof the same language as to contempt of authority which had appeared in Section VI of the 1789 act. Id., pp. 480, 483. The above contempt provision apparently was dropped in a

1796 act (an Act to revise and amend the judiciary system of the State). Id., p. 616. The text of this act has not been found but is believed to be substantially that of a 1797 act of the same title. The 1797 act contained no general contempt powers.

B. *Failure of Jurors to Attend Court*

1. A 1756 provincial act, limited in its application to the General Court and the Court of Sessions of Oyer and Terminer, provided for the summary imposition of fines not exceeding 8 pounds upon grand jurors, or members of struck special juries, neglecting or refusing to appear when summoned or, after appearance, refusing to serve or absenting themselves without leave of the court, and of fines not exceeding 4 pounds upon delinquent petit jurors. 18 Colonial Records of the State of Georgia, p. 144 (ed. A. D. Candler, 1910). (Apparently another act of the same title was enacted April 24, 1760; an explanatory act thereto was passed April 11, 1768, and an amendatory act thereto on February 27, 1770, but the texts have not survived. Digest Laws State Georgia, pp. 64, 149, 159.)

2. An act passed in 1760, amended in 1763 and 1766 and continued in 1773, establishing rules for holding special or extraordinary Courts of Common Pleas for the trial of causes between merchants, strangers and mariners, provided for fines not exceeding 4 pounds for petit jurors failing to appear or, on appearance, refusing to be sworn. 18 Col. Rec. Ga., pp. 362, 539, 762; 19(1) id., p. 429 (ed. A. D. Candler, 1910).

3. By a 1760 act, in causes for the recovery of small debts and damages before justices of the peace, or quar-

terly courts, petit jurors neglecting or refusing to appear when duly summoned were made subject to fines not exceeding 10 shillings sterling. 18 id., p. 372.

4. After independence, a 1778 act for opening and regulating the Superior Courts adopted substantially the provisions of the 1756 act except that the maximum amount of the fines was fixed at 10 pounds for grand jurors and 5 pounds for petty jurors, with no mention of struck special juries. Digest Laws State Georgia, pp. 219, 224.

5. A 1784 act, authorizing the appointing of Special Courts of Oyer and Terminer, provided that grand and petit jurors failing to appear when summoned be subject to the several fines "inflicted by the Superior Court law of this State, any law Usage or Custom to the Contrary thereof notwithstanding." 19(2) Col. Rec. Ga., p. 288 (ed. A. D. Candler, 1911).

6. The above 1778 act (Par. 4) was repealed by a 1789 act (An Act for Regulating the Judiciary Departments of this State) which, as noted *supra,* made no specific reference to fines for defaulting jurors but in Section VI gave the judges of the Superior Courts, *inter alia,* power "to punish, by usual fines or imprisonment, at the discretion of the judge or judges presiding, all contempts of authority in any cause or hearing before the civil court." Digest Laws State Georgia, pp. 389, 392. In Section LVIII of the same act it was provided, as to the inferior county courts established by the act, that "the drawing, summoning, and impannelling jurors, and the fines, forfeitures and penalties be the same as herein before pointed out for the government of the superior courts." Id., p. 405.

7. A 1792 act (An Act to Revise, Amend and Consolidate the Several Judiciary Acts of this State), repealing the 1789 act, as noted above, continued in Section IX thereof the same language as to contempt of authority as had appeared in Section VI of the 1789 act. Id., pp. 480, 483. However, there was no section comparable to Section LVIII of the 1789 act.

8. In 1796 an "Act to Revise and Amend the Judiciary System of the State" was enacted. Id., p. 616. The text, which has not been found, was apparently substantially the same as a 1797 act of the same title. The latter provided, as to defaulting jurors in the Superior Courts, in substantially the same manner as the 1778 act, except that the maximum fine for petit jurors was fixed at $20 and for grand jurors at $40. Id., pp. 619, 629. The inferior courts were granted the same power to fine petit jurors as the Superior Courts. Id., p. 638. An amendatory act of 1799 continued the provisions of the 1797 act as to defaulting jurors in the Superior Courts. Id., pp. 689, 704.

9. A 1796 act authorizing the mayor and aldermen of Savannah to have jurisdiction in civil causes not exceeding $50 authorized the court to fine petit jurors for their non-attendance or other misconduct in such manner as they might think proper, not exceeding $10. Id., p. 589-90.

10. By a 1797 act, petit jurors not appearing when summoned at the trial of appeals before justices of the peace were subject to a fine not exceeding $3. Id., pp. 619, 641.

C. *Failure of Witnesses to Appear or Testify*

1. The 1789 act regulating the judiciary departments of the State, *supra,* provided that, in the Inferior

Courts, witnesses who failed to attend upon subpoena or, being present, refused to give evidence were to be fined by the court for a contempt and be liable to the action of the summoning party at common law for all damages sustained by want of such testimony. Every person refusing to give evidence was also to be committed to the common gaol without bail or mainprize until he gave such evidence. Digest Laws State Georgia, pp. 389, 402. The same provisions were extended by a 1794 act so as to compel persons residing in Georgia to give testimony in another state. Id., p. 544.

2. The 1799 act relating to the judiciary system, *supra,* provided as to both Superior Courts and Inferior Courts that a witness duly summoned who failed to appear was to be attached and fined not exceeding $300 and be liable to an action by the summoning party for any damages sustained by the non-attendance. Id., pp. 689, 697.

D. *Refusal to Serve as Court Officers*

1. A 1759 act provided that any person refusing or neglecting to be sworn in as constable was to forfeit 10 pounds or, if no levy could be made, to be committed to a public gaol for 20 days. 18 Col. Rec. Ga., p. 327. This act may have been continued in effect after 1777 by the several State reception statutes. Digest Laws State Georgia, pp. 202, 231, 239, 280, 289. However, the editors of the 1800 Digest characterized the act as "Obsolete," cross-referencing a 1797 act not containing comparable provisions.

E. *Failure to Perform Official Duties*

1. A 1759 act provided that any constable refusing or neglecting to serve any precept or other lawful command of any justice of the peace was to forfeit a sum not exceeding 10 pounds, to be recovered by the party aggrieved before any two justices of the peace. For failure to deliver each year to one of the justices of the peace in their district lists of the persons eligible to serve as constables and of the freeholders qualified to serve as grand or petit jurors, a constable was to forfeit 20 shillings sterling to the poor of the parish in which the offense was committed. 18 Col. Rec. Ga., p. 327. This act may have been continued in effect after 1777 by the several State reception statutes. Digest Laws State Georgia, pp. 202, 231, 239, 280, 289. However, the editors of the 1800 Digest characterized the act as "Obsolete", cross-referencing the 1797 act discussed below. Id., p. 62.

2. The 1797 act relating to the judiciary system provided that constables failing to levy executions and make returns or failing to account for monies received on execution might have judgment in the amount of the execution and costs summarily awarded against them by a justice of the peace and be fined in an amount not exceeding 10% of the amount withheld. In the case of neglect or refusal to serve any warrant or summons the constable might be fined in a sum not exceeding the amount of the debt due from defendant. Id., pp. 619, 641.

III. Contempt Cases Arising Under Colony and State Acts

The few extant court records (see *supra*, p. 5) were not researched.

IV. Extension of Laws of England to Colony or State

1. A 1784 reception statute, largely concerned with colonial acts, also declared to be in full force, virtue and effect and binding on the inhabitants of the State "The common laws of England." Digest Laws State Georgia, pp. 289-90. This statute omitted the test of colonial usage found in several earlier temporary statutes. Id., pp. 202, 231. This reception provision would appear to include the common law of contempt, at least to the extent that it was not contrary to the constitution, laws and form of government established in the State.

V. Contempt Cases Arising Under Common Law or Usage

The few extant court records (see *supra*) were not researched.

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I. Judicial Establishment

Established at an early date in proprietary Maryland, the Provincial Court, held first in St. Mary's and later in Annapolis, was the principal common law court of original jurisdiction in both civil and criminal matters. It exercised appellate (and some transfer) jurisdiction over the County Courts, courts exercising, for the most part, limited jurisdiction in civil and criminal causes. From 1695 onward the apex of the judicial hierarchy was the Court of Appeals; prior thereto some appellate supervision over the Provincial Court had been exercised by the Lieutenant-Governor and Council. After the Revolution the Provincial Court became the General Court, holding sessions on both the eastern and western shores. The County Court system continued, being reorganized on a district basis in 1796. The Court of Appeals, with appellate jurisdiction over the General and Chancery Courts, was given constitutional status. The records examined included all the extant records of the Provincial Court and the General Court and some of the records of the Court of Appeals.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. A proposed act erecting an admiralty court (c. 1638-1639), not consented to by the Proprietor, provided that all criminal causes were to be tried by a jury of five or more "except that in Crimes of pyracie or other Capitall Crimes or Contempts belonging to the Jurisdiction" of the court were to be tried by a jury of twelve. 1 Archives of Maryland 46.

B. *Defamation or Abuse of Court or Court Officials*

1. A proposed act of 1638-1639, not consented to by the Proprietor, in determining what were "Enormious" offenses included "Contempts and misdomenors against lawfull ordinances or proclamations Abuses of publique Judges or Officers." 1 Arch. Md. 73.

C. *Misconduct in Court*

1. A proposed act, c. 1638-1639, not consented to by the Proprietor, defined the felonies which were subject to the death penalty, including assault upon the Lieutenant General of the Province, or upon any judge holding court, or upon any witness or juror in the presence of the court. 1 Arch. Md. 71-72. Another proposed act allowed benefit of clergy to certain felonies including "meere contempts with force as to assault or beat the Leiutent Generall of the province for the time being or to assault or beat any Judge sitting in Court or Wittness or Juror in presence of the Court." 1 Arch. Md. 72.

2. A 1642 act provided for the cutting off of the right hand, or burning of a hand, or "any other corporall shame or correction (not extending to life) or be fined as the Court shall think fitt" upon commission of any of the following offenses in the court's presence: striking an officer, juror or witness; striking anyone with a drawn weapon; or striking any magistrate or high sheriff "in or for the doing of his office". 1 Arch. Md. 193. A 1650 statute continued these penalties. 1 Arch. Md. 286.

3. A 1654 act reiterated that anyone striking an officer in the presence of the court was to lose his right hand. 1 Arch. Md. 350.

4. A law enacted c. 1680 authorized the county courts to impose fines not exceeding 100 pounds of tobacco in order to maintain order. 7 Arch. Md. 70. This act and any other proprietary acts then in effect were repealed by an act passed under the first royal governor. 13 Arch. Md. 560.

5. A 1699 act provided for a fine of ten shillings or one hour in the stocks for swearing during the sitting of court. 22 Arch. Md. 523. A 1704 statute reaffirmed the fines and extended the period in the stocks to two hours. 26 Arch. Md. 321.

6. A 1718 law provided that magistrates were required, under pain of censure from the legislature, to observe with strictness the conduct of all practitioners and to punish any "undecent Liberties to the Lessening the Grandure of the respective Courts", either by suspension from practice, or by fine not to exceed 1000 pounds of tobacco. 36 Arch. Md. 525. This act was superseded by the 1719 act *infra*.

7. A 1719 act authorized the courts and judges of the Province to "observe the Demeanor of all Practitioners of the Law, before them, as well as all Ministerial Officers, or other Persons who shall use any undecent Liberties to the lessening the Grandeur and Authority of their respective Courts, and to discountenance and punish the same, according to the Nature of the Offence," either by suspending such practitioner from practice for a period of time or perpetually, or by fine not to exceed 4000 pounds of tobacco in the superior courts or 2000 pounds in the county courts for each offender for each offense. 33 Arch. Md. 461. This act also provided

that if any person behaved "indecently" towards any magistrate in the execution of his office, he was subject to a fine not to exceed 1,000 pounds of tobacco, or imprisonment not to exceed two days, or being placed in the stocks for about two hours. The statute also provided that nothing contained therein was to be construed to lessen the "Authorities vested by Law in the several Courts." Ibid. This act was still in effect in 1765, being ch. IV of the laws of 1719 in Bacon, Laws of Maryland at Large (1765).

8. A 1723 statute provided that for drunkenness and swearing in the presence of magistrates, the offender, where fines (2s., 6p., or 5s. for cursing, 5s. for being drunk) could not be paid, was to be whipped not more than 39 lashes, and that any person might be appointed a constable to punish such offender. Failure of a person so appointed to serve was to result in a forfeiture of ten shillings current money. 34 Arch. Md. 733.

9. A 1790 statute, designed to limit the jurisdiction of the General Court in criminal cases, provided that the "judges of the general court shall not be prevented from punishing, by fine and imprisonment, all contempts in the non-attendance of jurymen or witnesses, and all others committed in the presence or hearing of the court, as heretofore." Md. Laws, 1790, c. 50.

D. *Failure of Jurors to Attend Court*

1. A proposed law c. 1638-1639, not consented to by the Proprietor, imposed a penalty of 100 pounds of tobacco upon each non-appearing grand juror, and 50 pounds of tobacco upon each non-appearing petit juror. 1 Arch. Md. 47.

2. A 1661 act provided that persons refusing to serve as jurors should forfeit 500 pounds of tobacco or, upon default of the penalty, should suffer two months imprisonment. 1 Arch. Md. 410.

3. A 1692 act continued the fine of 500 pounds of tobacco and the two-months period of imprisonment for jurors refusing to serve. 13 Arch. Md. 515.

4. A 1699 law provided for a fine of 1000 pounds of tobacco for refusal to serve upon a Provincial Court jury. For refusal to serve on a County Court jury, the fine was 250 pounds of tobacco. 22 Arch. Md. 511.

5. A 1704 law imposed fines of 1000 and 500 pounds of tobacco upon defaulting grand and petit jurors in the Provincial and County Courts, respectively. 26 Arch. Md. 424. These provisions were re-enacted in a 1715 statute. 30 Arch. Md. 308. The 1715 law continued in effect until at least 1765, being part of ch. XXXVII of the laws of 1715 in Bacon, Laws of Maryland at Large.

6. A 1723 act provided that jurors who failed to attend the Assizes were subjected to the same penalties as those failing to attend the Provincial Court (36 Arch. Md. 565). This was reaffirmed in 1732. 37 Arch. Md. 523. In 1747, juror defaults at the Assizes were to be punished the same as those in the Provincial Court, "rating tobacco at ten shillings per hundred." 44 Arch. Md. 588. This provision was re-enacted in 1753 (50 Arch. Md. 275), and 1766 (61 Arch. Md. 75).

7. A 1773 act provided that jurors who failed to appear were to be fined 500 pounds of tobacco, rating tobacco at 10 shillings per hundred. 64 Arch. Md. 228. A 1778 statute authorized judges of General and County

Courts to fine defaulting jurors not more than 50 and 30 pounds respectively. Md. Laws (Oct. 1778 Sess.), c. 21.

8. A 1782 statute provided for a fine of 35 pounds current money for non-attendance by a juror at the General Court, without sufficient excuse. Md. Laws (April 1782 Sess.), c. 40. A County Court might fine not to exceed 20 pounds current money. Ibid. This statute was continued for 7 years in 1785. Md. Laws, 1785, c. 77.

9. A 1788 statute provided for a fine not to exceed ten pounds current money for non-attendance of persons summoned as jurors. Md. Laws (May 1788 Sess.), c. 11. This was re-enacted in 1789. Md. Laws, 1789, c. 44.

10. A 1790 statute authorized any associate justice of a County Court to issue attachments for contempt against jurors for non-attendance. Md. Laws, 1790, c. 33.

11. A 1789 statute provided for a fine not to exceed ten pounds current money for non-attendance of jurors. Md. Laws, 1789, c. 44.

12. By statute in 1790, a single justice was authorized to issue attachments for contempt for defaulting jurors. Md. Laws, 1790, c. 33; see also id., 1793, c. 57, sec. 5.

13. A 1793 statute provided for a fine not to exceed 10 pounds current money for non-attendance of jurors. Md. Laws, 1793, c. 57.

E. *Failure of Witnesses to Appear or Testify*

1. A 1661 law provided that witnesses who refused to testify were to forfeit 500 pounds of tobacco and, upon

inability to pay the fine, they were to be imprisoned for two months. 1 Arch. Md. 410.

2. A 1692 act re-affirmed the penalties of the 1661 law for witnesses who refused to testify. 13 Arch. Md. 515.

3. Another 1692 act provided that any witness summoned in any court of record who did not appear, without reasonable excuse, was to forfeit 10 pounds sterling, and to yield to the aggrieved party further recompense, at the discretion of the judge, according to the loss and hindrance sustained by the non-appearance of the witness. The several sums were to be recovered by action of debt, etc., in any court of record. 13 Arch. Md. 458; Bacon, Laws of Maryland at Large, 1692, c. XVI.

4. A 1715 act provided for fines of 1000 pounds of tobacco for witnesses not appearing according to process in the Provincial Court and 500 pounds in the County Courts. They were also liable in an action on the case to the parties summoning them for the damages sustained for want of appearance. Such defaulting witnesses might also have their bodies attached to oblige their attendance. Any witness, summoned or attached, who refused to testify was to be committed to jail until willing to give evidence. 30 Arch. Md. 308; Bacon, Laws of Maryland at Large, 1715, c. XXXVII, section V (1765).

5. A 1773 act provided that defaulting witnesses were to be fined not to exceed 1000 pounds of tobacco, rating tobacco at 10 shillings per hundred, and, in default, the court could attach the witness and compel his attendance. 64 Arch. Md. 228.

6. A 1778 statute authorized fines not exceeding 50

pounds of current money and not exceeding 30 pounds of current money for non-attendance by witnesses at the General and County Courts, respectively. Md. Laws (Oct. 1778 Sess.), c. 21. A 1782 statute reduced the penalty to 35 pounds current money for non-attendance at the General Court and to 20 pounds current money for non-attendance at the County Courts. Md. Laws (April 1782 Sess.), c. 40. This statute was continued for 7 years in 1785. Md. Laws, 1785, c. 77.

7. A 1788 statute provided for a fine not to exceed 10 pounds current money for non-attendance of a witness, and the courts were authorized to issue process of attachment to compel attendance. Md. Laws (May 1788 Sess.), c. 11, sec. 7. This was repeated by a 1789 statute. Md. Laws, 1789, c. 44.

8. A 1789 statute authorized the High Court of Chancery to provide for the making of surveys and provided that upon default of duly summoned witnesses to appear before the surveyors, the witnesses were to be held in contempt of court and dealt with as in the other cases of contempt. Md. Laws 1789, c. 35, sec. 6. Section 7 contained a similar provision for default in attendance of witnesses upon warrants of resurveys from the General or any County Court.

9. A 1789 statute authorized fines not to exceed 10 pounds for defaulting witnesses, together with attachment. It also authorized justices of any court to issue subpoenas directed to witnesses who resided in other counties of the state and, upon non-attendance, the justices might issue attachment against such witnesses. Md. Laws, 1789, c. 44.

10. A 1790 statute authorized any associate justice of the County Court to issue subpoenas for witnesses and to issue attachments against witnesses for non-attendance. Md. Laws, 1790, c. 33. This statute was extended for 3 years in 1793. Md. Laws, 1793, c. 23; see also id., c. 57.

11. A 1791 statute authorized the justices to issue attachments for contempt for defaulting witnesses and to fine the offenders any sum not exceeding twenty shillings for each such offense. Md. Laws, 1791, c. 48.

12. A 1793 statute provided for a fine not to exceed ten pounds current money for non-attendance by witnesses. Md. Laws, 1793, c. 57, sec. 8. A single justice had the authority to issue subpoenas for witnesses and to issue attachments for contempt for non-attendance (id., c. 57, sec. 5). The 1793 statute also authorized attachments for contempt against defaulting witnesses or defendants residing in other counties (id., sections 30 and 31). The first two provisions of the 1793 statute were re-enacted in a 1799 statute. Md. Laws, 1799, c. 58, sections 4 and 7.

F. *Refusal to Serve as Court Officers*

1. A proposed law, c. 1638-1639, not assented to by the Proprietor, provided that if appointees to office, including sheriffs and constables, refused to serve, they were to forfeit a certain quantity of tobacco. 1 Arch. Md. 54.

2. A 1661 act provided that one who refused to serve as a constable was to forfeit 500 pounds of tobacco or, upon inability to pay the fine, be imprisoned for two months; and those who refused to serve as justices of

the peace, sheriff or coroner was to forfeit 1000 pounds of tobacco or, upon inability to pay the fine, be imprisoned for four months. 1 Arch. Md. 410.

3. A 1692 act provided for a forfeiture of 500 pounds of tobacco or two months' imprisonment for refusal to serve as a constable, and for a forfeiture of 1000 pounds of tobacco or four months' imprisonment for refusal on the part of a justice of the peace, sheriff or coroner to execute their respective offices. 13 Arch. Md. 515.

4. A 1704 statute provided for a fine of 500 pounds of tobacco for any person who refused to serve as constable. 26 Arch. Md. 343. This was reiterated in a 1715 act. 30 Arch. Md. 274. The 1715 act (ch. XV) and a supplemental act of 1752 (ch. VII, section II) appear in Bacon, Laws of Maryland at Large.

5. A law enacted in 1723 provided for a fine of 10 shillings current money for anyone refusing to serve as constable after having been duly appointed to serve. 34 Arch. Md. 733. This act does not appear in Bacon, Laws of Maryland at Large.

6. A 1782 statute provided for a fine of ten pounds current money for one who neglected to carry out the duties of constable or failed to find a sufficient person to act in his stead. Md. Laws (April 1782 Sess.), c. 40. This statute was continued in 1785 for seven years. Md. Laws, 1785, c. 77.

G. *Failure to Perform Official Duties*

1. A 1663 act provided that commissioners who failed to appear in court according to the time set out in the statute were subject to a fine of 100 pounds of tobacco

unless they showed good cause for their defaults. 1 Arch. Md. 496.

2. An act c. 1669 imposed a fine of 100 pounds of tobacco for non-appearance in court by a commissioner. 2 Arch. Md. 222. A later law increased the penalty to 200 pounds of tobacco. 2 Arch. Md. 397 (1674). This penalty was reaffirmed by a 1684 act (13 Arch. Md. 122) and a 1692 act (13 Arch. Md. 528).

3. A 1699 act provided for a fine of 1000 pounds of tobacco for default of a sheriff in summoning jurors to the Provincial Court; and for a fine of 500 pounds of tobacco for a similar default in relation to the County Courts. 22 Arch. Md. 511.

4. A 1704 act provided that sheriffs who failed to summon jurors to the Provincial Court were to be fined 1000 pounds of tobacco, and to the County Courts 500 pounds of tobacco. 26 Arch. Md. 424. These penalties were confirmed by ch. XXXVII of the laws of 1715 which appears in Bacon, Laws of Maryland at Large.

5. A 1732 act provided for a fine of 5000 pounds of tobacco upon a sheriff who neglected to return for jury service the most capable freeholders. 37 Arch. Md. 523. In 1742, the fine was changed to 25 pounds current money of Maryland (42 Arch. Md. 398), and was thus repeated in 1747 (44 Arch. Md. 588), 1753 (50 Arch. Md. 275), and 1766 (61 Arch. Md. 75).

6. A 1773 statute provided that a sheriff who neglected to summon proper jurors was to be fined not exceeding 3000 pounds of tobacco, rating tobacco at 10 shillings per hundred. 64 Arch. Md. 228.

7. A 1788 statute provided for a fine of 100 pounds

current money for neglect of a sheriff in summoning jurors. Md. Laws (May 1788 Sess.), c. 11. This was re-enacted in 1789. Md. 1789 Laws, c. 44, sec. 6. The 1789 statute also provided for the issuance of process directed against a defaulting witness in another county, and, upon failure of the sheriff to execute and return such process, he might be fined by the court issuing the same. Id., sec. 32.

8. A 1790 statute provided that all sheriffs, clerks and other civil officers should perform the same offices and duties, under the same penalties, as they were obliged by law to perform, and to execute them in the county courts as now established. Md. Laws, 1790, c. 33. This statute was continued in 1793 for 3 years. Md. Laws, 1793, c. 23.

H. *Failure to Comply with Process*

1. A 1768 law provided that a sheriff who failed to bring in a defendant according to the return should be amerced for the sum and costs recovered against the person taken on execution. 61 Arch. Md. 438.

2. A 1785 law provided that a defendant who refused to appear before the High Court of Chancery might be attached for contempt and committed until discharged. Md. Laws, 1785, c. 72, sec. 20. The act also provided that upon violation of a Chancery Court order, process or rule, the offender was to be fined not exceeding ten pounds current money and committed until the court's process, rule or order had been fully performed and the fine and costs paid. Id., sec. 23. The act further provided that one who violated an injunction might be ordered attached for contempt and committed until

further order of the Chancery Court. Id., sec. 30. The chancellor might appoint three commissioners to view the waste, and might keep the defendant in custody until he paid double the value of the waste so found and damages. Ibid. The statute also authorized the chancellor to commit any person for contempt in not obeying any rule, order or decree of the court. Id., sec. 35.

3. A 1785 act provided for a fine not to exceed ten pounds current money for the refusal or neglect of a sheriff or other public officer to make return of a writ, process or order of the Chancery Court. Md. Laws, 1785, c. 72, sec. 26. This same statute provided that if a sheriff or other public officer failed to comply with the court's process or order, he might be amerced any sum of money or tobacco, fined for contempt, ordered to pay costs, and compelled to comply with the process or order. The court could order him committed until the fine and amercement were paid. Id., sec. 24.

4. A 1791 statute provided for a fine of not more than seven shillings and six pence for a constable's default in making return on warrant. The statute also authorized the court to enter judgment against a constable for the amount of plaintiff's debt and costs where the constable failed to produce the body of the defendant after having made return on a warrant that he had taken the body of the defendant. Md. Laws, 1791, c. 48, sec. 11. The statute authorized a fine not to exceed ten shillings against a sheriff who failed to make return of any execution delivered to him, and judgment for plaintiff against the sheriff for the debt and costs upon the

failure of a sheriff to produce the body of the defendant which he had theretofore attached. Id., sec. 12.

5. A 1793 statute authorized the court to fine any sheriff who neglected or delayed in serving and returning any subpoena or attachment. Md. Laws, 1793, c. 57, sec. 30. A sheriff who neglected or delayed to execute and return process summoning a defendant in another county was to be fined in the discretion of the court. Id., sec. 31.

6. Another 1793 statute authorized amercement of a sheriff for the amount of judgment for plaintiff upon his failure to bring in the defendant according to the return. Md. Laws, 1793, c. 60.

7. A 1794 statute provided that judgment for plaintiff was to be entered against any sheriff or coroner who failed to make return on a writ of execution within the time limited by rule of court or who failed to return the original writ within the time allowed. Md. Laws, 1794, c. 54, sections 1 and 2. In all such cases, the sheriff or coroner was to be entitled to plaintiff's cause of action. Id., sec. 3.

I. *Failure to Obey Court Rules*

1. A 1692 act gave the County Courts discretion to make the necessary rules for the governing of courts under such fines as they shall think fit, but not to exceed 100 pounds of tobacco. 13 Arch. Md. 521; see also 22 Arch. Md. 553 (1699) and 22 Arch. Md. 98 (1700).

2. A 1704 law provided that justices of the County Courts were authorized to make rules and regulations,

and to punish violators by fine not exceeding 100 pounds of tobacco. 26 Arch. Md. 283.

3. A 1715 act authorized the Provincial and County Courts to make rules and orders for the governance of proceedings, and to punish violators with fines up to 1000 pounds of tobacco in the Provincial Court and 500 pounds of tobacco in the County Courts. 30 Arch. Md. 239. This law appears in Bacon, Laws of Maryland at Large, as ch. XLI of the laws of 1715.

4. A 1723 act provided that the justices of Assize were authorized to make rules and orders necessary for the furtherance of justice, and to punish offenders by reasonable fines, forfeitures and penalties. 36 Arch. Md. 565. This was renacted in 1732 (37 Arch. Md. 523), 1742 (42 Arch. Md. 398), 1747 (44 Arch. Md. 588), 1753 (50 Arch. Md. 275), and 1766 (61 Arch. Md. 75).

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court*

1. Seven entries appearing in the records of the Provincial Court from 1642 through 1650 reflect that over twenty persons were fined from 50 to 100 pounds of tobacco for non-appearance as grand or petit jurors. 4 Arch. Md. 156, 177, 180, 237, 430, 470, 480-81. All but one of these parties were fined 100 pounds of tobacco.

2. For non-appearance of three petit jurors in Provincial Court; fined according to statute. 49 Arch. Md. 319 (1664).

3. Four entries appearing in the Provincial Court records for the period 1666-1670 reflect that fifteen persons received fines for non-appearance as grand or petit

jurors, with one party being fined 50 pounds of tobacco and the remaining persons being fined 500 pounds of tobacco each. 57 Arch. Md. 202, 355, 564-65, 567-68 and 577.

4. For departing from coroner's jury before verdict; fined 1000 pounds. 57 Arch. Md. 609 (1666-1670).

5. Presentment for refusal to serve on coroner's jury; no outcome indicated. 57 Arch. Md. 615 (1666-1670).

6. Six entries appearing in the Provincial Court records for the period 1670-1675 reflect that over twenty persons were fined 500 pounds of tobacco each for non-attendance as grand and petit jurors. 65 Arch. Md. 18, 21, 25, 29, 31-32, 45, 225, 241, 314, 332. Three fines were remitted.

7. Five entries appearing in the Provincial Court records for the period 1684-1701 show that over ten jurors were fined for non-attendance, with 5 jurors being fined 500 pounds of tobacco each and another juror being fined five pounds. Liber D.S., No. A (1684-1687), pp. 37, 46, 52, 287, 397, 532; Liber T.L. No. 1 (1694-1696), pp. 201, 272; Liber H.W. No. 3 (1697), p. 435; Liber W.T., No. 3 (1699-1701), pp. 9, 418, 424, 629 (These volumes and the other manuscript records referred to below are located at the Hall of Records, Annapolis, Md.).

8. For absenting himself from Provincial Court jury after having been sworn; fined 40 shillings. Liber W.T., No. 3 (1699-1701), pp. 428, 627.

9. Ten entries appearing in the Provincial Court records for the period 1702-1724 show that over ten

persons were fined for non-appearance as grand or petit jurors, and that, where specified, the fines were between 100 and 1,000 pounds of tobacco. Liber W.T., No. 4 (1702), p. 180; Liber P.L., No. 3 (1709-1710), p. 234; Liber T.P., No. 2 (1711-1712), pp. 194-97, 331-32, 578; Liber V.D., No. 1 (1713-1716), p. 10; Liber V.D., No. 2 (1716-1717), p. 8; Liber W.G., No. 1 (1719-1722), pp. 112, 114, 301.

10. Thirteen entries appearing in the Provincial Court records from 1727 to 1750 reflect that about sixty persons were dealt with by the court for non-appearance as grand or petit jurors. A number of such persons were fined and a number were discharged after having been heard by the court (either in response to an order to show cause or upon attachment in two cases). Liber R.B. 1 (1727-1728), pp. 3, 204; Liber E.I. 7 (1742-1744), pp. 6, 470, 636, 640; Liber E.I. 9 (1744-1745), pp. 224, 225, 446, 465-66; Liber E.I. 10 (1745-1748), pp. 35, 63. Four jurors were fined 1,000 pounds of tobacco each. Liber E.I. 9 (1744-1745), pp. 225, 466. Others were fined "according to the statute." Liber E.I. 7 (1742-1744), p. 636. Three fines of 500 pounds of tobacco were remitted. Liber R.B. 1 (1727-1728), pp. 3, 204.

11. For failure of jurors to appear in Provincial Court; summons issued to all defaulting jurors to show cause why they should not be fined according to statute. Liber E.I. 11 (1748-1749), p. 209.

12. Twenty-two entries appearing in the records of the Provincial Court from 1750 to 1759 reflect that the court concerned itself with contempt matters involving over 80 persons who failed to appear as grand or petit jurors, of whom at least twelve were fined and the re-

mainder either discharged after having made excuse or the outcome was not shown. Liber E.I. 13 (1751), pp. 476, 838; Liber E.I. 14 (1751-1753), pp. 226, 241, 572, 782; Liber E.I. 15 (1753-1754), p. 163; Liber B.T. 3 (1757-1759), pp. 287, 576, 888; Liber B.T. 5 (1759-1760), pp. 227, 530, 843. Of the fines imposed, three persons were fined 1,000 pounds of tobacco each (Liber E.I. 14 (1751-1753), p. 782); two were fined 800 pounds of tobacco each (Liber E.I. 14 (1751-1753), p. 572); two were fined 500 pounds of tobacco each (Liber E.I. 14 (1751-1753), p. 572; Liber B.T. 5 (1759-1760), p. 227); and five were fined "according to the statute" (Liber E.I. 15 (1753-1754), p. 163).

13. Nineteen entries appearing in the records of the Provincial Court from 1760 to 1765 reflect that the court dealt with the contempt of over 70 persons for non-appearance as jurors, of whom at least 25 were punished by way of fine. Liber D.D. 1 (1760-1761), p. 202; Liber D.D. 2 (1761-1762), pp. 97, 336; Liber DD. 3 (1762-1763), pp. 136, 144; Liber D.D. 4 (1763), pp. 118, 154; Liber D.D. 5 (1762-1764), pp. 293, 294; Liber D.D. 6 (1764), pp. 298, 305; Liber D.D. 7 (1764-1765), pp. 288, 290-91. Of the fines imposed, three were for 1,000 pounds of tobacco (Liber D.D. 2 (1761-1762), p. 97; Liber D.D. 4 (1762-1764), p. 294; D.D. 7 (1764-1765), p. 288); one was for 800 pounds of tobacco (Liber D.D. 4 (1762-1764), p. 294); one was for 600 pounds of tobacco (Liber D.D. 4 (1763), p. 118); two were for 200 pounds of tobacco (Liber D.D. 5 (1762-1764), p. 294; Liber D.D. 3 (1762-1763), p. 136); and 17 were fined unspecified amounts according to the statute (Liber

D.D. 3 (1762-1763), p. 144; Liber D.D. 4 (1763), p. 118; D.D. 6 (1764), p. 298).

14. Fifty-six entries appearing in the records of the Provincial Court from 1766 to 1770 reflect that the court dealt with the contempts of over 145 persons for non-appearance as jurors, or whom at least 34 were punished by way of fine. Liber D.D. 12 (1767), pp. 598, 603-05, 612-13, 615, 621, 627, 632, 633, 634, 643, 645, 646, 657, 661, 672, 674, 679; Liber D.D. 13 (1767-1768), pp. 15, 16, 23-24, 26, 30, 35, 45, 47, 49, 50, 51, 53, 54, 56, 71-72, 77, 78, 89, 214; Liber D.D. 14 (1768), pp. 636, 637, 644, 646, 649, 656, 659, 676; Liber D.D. 15 (1768-1769), pp. 7, 8, 23, 33, 37, 38, 41, 45-46, 163, 315, 317. Of the fines imposed, two were for 1,000 pounds of tobacco (Liber D.D. 12 (1767), p. 615); one was for 200 pounds of tobacco (Liber D.D. 14 (1768), p. 646); twelve were for 100 pounds of tobacco (Liber D.D. 12 (1767), p. 621; Liber D.D. 13 (1767-1768), pp. 45, 50; Liber D.D. 14 (1768), p. 646); eighteen were for 50 pounds of tobacco (Liber D.D. 12 (1767), pp. 632, 633; Liber D.D. 13 (1767-1768), pp. 30, 54, 56); one was for 20 pounds of tobacco (Liber D.D. 15 (1768-1769), p. 8); eleven were for 10 pounds of tobacco (Liber D.D. 13 (1767-1768), p. 15; Liber D.D. 14, p. 637; Liber D.D. 15 (1768-1769), p. 38); and one was for an unspecified amount (Liber D.D. 12 (1767), p. 598).

15. Eight entries appearing in the records of the Provincial Court from 1770 to 1776 show that the court dealt with the contempt of over 65 persons for non-appearance as jurors. The entries reflect that these persons were summoned to court to answer for their defaults and that some were later discharged by the court.

Liber D.D. 17 (1770-1771), p. 11; Liber D.D. 18 (1771-1772), pp. 197, 384; Liber D.D. 19 (1773-1774), pp. 159, 386, 496; Liber D.D. 20 (1774-1776), pp. 112-113, 420-421. One entry shows that two defaulting parties were each fined four pounds current money, and that one paid his fine and the other, upon refusal to pay the same, was ordered committed. Liber D.D. 19 (1773-1774), p. 386.

16. Thirteen entries appearing in the records of the General Court for the Eastern Shore from 1778 to 1805 show that 16 persons were either attached or proceeded against by the court for contempt in not appearing as grand or petit jurors. Ms. Judgment Book (1778-1782), pp. 29-40, 117-18, 214-15, 216, 247; Ms. Judgment Book (Criminal) J.E. (1782-1786), p. 24; Ms. Minute Book (1778-1781), Sept. Term, 1778; April 23, 1779; Oct. Term, 1780; April Term, 1781; Ms. Minute Book (1790-1791), Sept. Term, 1790. Two of these defaulting persons were fined 1,000 pounds of tobacco each. Ms. Judgment Book (1778-1782), pp. 39, 117-18. The remaining entries do not reflect what, if any, penalties were imposed.

17. Fifteen entries or series of entries appearing in the records of the General Court for the Western Shore between 1774 and 1800 show that a large number of persons were attached or otherwise dealt with for contempt in not appearing as grand or petit jurors. Liber D.D. 20 (1774-1776), pp. 495-96; Liber D.D. 21 (1775-1778), pp. 359, 402, 404, 405; Liber T.B.H. 1 (1779-1780), pp. 3, 241, 244, 276-80, 506, 623-25; Liber T.B.H. 2 (1781-1782), pp. 37-41, 74, 244-46; Liber, J.G. 1 (1788), pp. 1-16, 34, 35; Liber J.G. 3 (1789), pp. 4, 8-15, 19; Liber J.G. 13 (1791), p. 2; Liber J.G. 15 (1792), pp. 2-3. One

defaulting juror was fined six pounds, five shillings and costs (Liber D.D. 21 (1775-1778), p. 404), and four were fined ten shillings each (Liber J.G. 13 (1791), p. 2; Liber J.G. 15 (1792), pp. 2-3). A number of these defaulting jurors were subsequently discharged, paying costs.

B. *Failure of Witnesses to Appear or Testify*

1. For witness in Provincial Court refusing to testify under oath; fined 500 pounds of tobacco. 49 Arch. Md. 193 (1664).

2. For three witnesses in Provincial Court who refused to take oaths at an inquest; fined according to statute. 49 Arch. Md. 231 (1664).

3. For witness failing to appear in Provincial Court; fined 500 pounds of tobacco. 57 Arch. Md. 36 (1667).

4. For refusal to testify in Chancery Court and answer plaint of orphan; witness fined 500 pounds of tobacco. 57 Arch. Md. 568.

5. Four entries appearing in the Provincial Court records from 1684 to 1701 reflect that four persons who refused to attend court or to testify were dealt with by way of attachment or fine for contempt. With the exception of a fine of five pounds, the amounts of the fines do not appear, but two were remitted. Liber D.S., No. A (1684-1687), pp. 206-07, 397, 532; Liber W.T., No. 3 (1699-1701), pp. 628-29.

6. For non-attendance in Provincial Court as a witness for the crown; fined 200 pounds of tobacco. Liber P.L., No. 1 (1706-1707), p. 90.

7. For non-attendance as a witness for the crown in the Provincial Court; fined five pounds current money

for contempt but fine later remitted. Liber P.L., No. 1, pp. 213, 229.

8. For non-attendance as a witness in Provincial Court; fined five pounds "for his contempt according to the custom." Liber V.D., No. 1 (1713-1716), p. 11.

9. For non-attendance as a witness in Provincial Court; ordered that witness be attached to show cause why he should not be fined five pounds, but order rescinded upon the showing of insufficient cause. Liber V.D., No. 3 (1717-1718), p. 109.

10. For non-attendance of witness in Provincial Court; attached, but after pleading illness, discharged, paying fees. Liber E.I. 7 (1742-1744), pp. 469, 627-28.

11. For not appearing as witnesses in Provincial Court; attachments for contempt issued. Liber E.I. 9 (1744-1745), pp. 225, 446.

12. For non-appearance as a witness in Provincial Court civil case; discharged upon payment of fees. Liber E.I. 10 (1745-1748), p. 63.

13. Twelve entries appearing in the records of the Provincial Court from 1751 to 1760 show attachments for contempt ordered by the court involving 20 persons who failed to attend the court as witnesses. Liber E.I. 14 (1751-1753), pp. 217, 770; Liber E.I. 15 (1753-1754), pp. 356-57; Liber G.S. 1 (1755), pp. 491-92; Liber B.T. 3 (1757-1759), pp. 3, 568-69, 887, 888, 891; Liber B.T. 5 (1759-1760), pp. 215, 512, 530, 811, 812, 815. Most were discharged upon payment of costs or fees.

14. Twenty-seven entries appearing in the records of the Provincial Court from 1761 to 1770 reflect that attachments for contempt were ordered by the court involving 54 persons who failed to attend as witnesses

the court or, in five cases, the grand jury. Liber D.D. 1 (1760-1761), pp. 367, 498; Liber D.D. 2 (1761-1762), pp. 92, 93, 362; Liber D.D. 3 (1762-1763), pp. 133, 141-42; Liber D.D. 4 (1763), pp. 141, 143, 291; Liber D.D. 5 (1762-1764), pp. 291, 293; Liber D.D. 6 (1764), pp. 291, 296, 299; Liber D.D. 7 (1764-1765), pp. 289, 290; Liber D.D. 9 (1765), pp. 23, 26, 27; Liber D.D. 10 (1765-1766), pp. 77, 78, 81; Liber D.D. 12 (1767), pp. 626, 663, 668, 672; Liber D.D. 13 (1767-1768), pp. 36-37, 87; Liber D.D. 14 (1768), pp. 632, 643; Liber D.D. 15 (1768-1769), pp. 20-22; Liber D.D. 16 (1769-1770), pp. 1, 7-8, 406. Most were discharged by the court upon payment of fees or costs. One person, however, was fined 20 pounds of tobacco for his default. Liber D.D. 13 (1767-1768), pp. 36-37. The defaults before the grand jury may be found at Liber D.D. 6 (1764), p. 291; Liber D.D. 9 (1765), p. 23 (2 witnesses); Liber D.D. 13 (1767-1768), p. 87; and Liber D.D. 15 (1768-1769), p. 21.

15. Seven entries appearing in the records of the Provincial Court from 1771 to 1776 reflect that attachments for contempts were ordered by the court involving 10 persons who failed to attend the court as witnesses. Liber D.D. 17 (1770-1771), pp. 8, 11; Liber D.D. 18 (1771-1772), p. 80; Liber D.D. 19 (1773-1774), pp. 13, 16, 383, 591, 602; Liber D.D. 20 (1774-1776), pp. 420-21.

16. Twenty entries appearing in the records of the General Court for the Eastern Shore from 1778 to 1805 reflect that over 175 persons were attached or, in three cases, summoned to answer for non-appearance as witnesses before the court or, in two cases, before a grand jury. Liber I.E.F. (1790), p. 22; Ms. Judgment Book

(1778-1782), pp. 218-19, 246, 247; Ms. Minute Book (1778-1781), Sept. Term, 1780; Ms. Minute Book (1786-1787), April Term, 1786, Sept. Term, 1787; Ms. Minute Book (1788-1789), Sept. 23, 1788, Sept. 29, 1788, April 17, 1789, April 25, 1789, April 28, 1789, May 2, 4 and 5, 1789, Sept. 15, 22 and 23, 1789; Ms. Minute Book (1790-1791), Sept. Term, 1790; Ms. Minute Book (1792-1793), Sept. Term, 1792; Ms. Minute Book (1794), Sept. Term, 1794, Sept. Term 1797. One such defaulting witness was fined by the court eleven shillings and three pence. Ms. Minute Book (1794), Sept. Term, 1797. A defaulting witness in a treason case was proceeded against by way of suit to forfeit his bond of 100 pounds current money. Ms. Judgment Book (1778-1782), pp. 218-19. Five other entries during this period reflect that 17 other persons were simply "attached" by the court. Ms. Minute Book (1778-1781), Sept. Term, 1778, April Term, 1779 (two entries); Ms. Minute Book (1788-1789), Sept. 15, 1788; Ms. Minute Book (1786-1787), May Term, 1786.

17. Seventeen entries or series of entries appearing in the records of the General Court for the Western Shore show that between 1774 and 1800 over 100 persons were either attached or otherwise dealt with for contempt for not appearing or refusing to testify as witnesses in court. Liber D.D. 20 (1774-1786), pp. 452, 455, 456, 457, 497-501; Liber D.D. 21 (1775-1778), pp. 354, 406-10; Liber T.B.H. 1 (1779-1780), pp. 1, 3, 91, 92, 140-42, 509, 522; Liber T.B.H. 2 (1781-1782), pp. 5, 37-41, 74, 211, 244-46; Liber T.B.H. 3 (1782), p. 3; Liber J.G. 1 (1788), pp. 1-16, 34, 35; Liber J.G. 3 (1789), pp. 4, 8-15, 19; Liber J.G. 5 (1789), pp. 2, 5, 6, 7, 8; Liber

J.G. 27 (1795), p. 4. Of this number, two were committed until they testified (Liber D.D. 20 (1774-1776), pp. 455, 456); one was to forfeit his recognizance in the amount of 100 pounds current money (id., pp. 497-501). One was fined six pounds and five shillings, and costs (Liber D.D. 21 (1775-1778), p. 404); and one was fined ten shillings (Liber J.G. 27 (1795), p. 4). Three entries in the records between 1775 and 1778 reflect that recognizances were taken for the appearance of witnesses, and two of the entries show that the recognizances varied between 50 and 250 pounds current money. Liber D.D. 21 (1775-1778), pp. 355, 361-64, 406-10.

C. *Failure to Perform Official Duties*

1. For failure of sheriff to return sufficient jurors to Provincial Court; fined 1000 pounds of tobacco. Liber V.D., No. 2 (1716-1717), p. 178.

2. For failure of sheriffs of Cecil and Queen Anne Counties to return sufficient jurors; fined 500 pounds of tobacco each by Provincial Court. Liber V.D., No. 3 (1717-1718), p. 107.

3. For failure of sheriff to return a sufficient number of jurors to Provincial Court; ordered to pay the fee for *venire facias*. Liber E.I. 6 (1739-1741), p. 1.

4. For failure by three sheriffs to return jurors to Provincial Court; ordered that they show cause why they should not be fined in accordance with the statute. Liber E.I. 10 (1745-1748), p. 485.

5. For failure by two sheriffs to return sufficient jurors to Provincial Court; summons issued to show cause why they should not be fined according to statute. Liber E.I. 11 (1748-1749), p. 209.

6. For failure by sheriff to return as jurors to Provincial Court the most substantial and understanding freeholders; fined 600 pounds of tobacco. Liber E.I. 13 (1751), p. 476.

7. Clerk of Provincial Court ordered to write sheriffs that unless they summoned as jurors the most substantial and understanding freeholders, they would be fined according to the statute. Liber B.T. 5 (1759-1760), p. 217.

8. For failure of sheriff to return a sufficient number of jurors to Provincial Court; fined 500 pounds of tobacco. Liber B.T. 5 (1759-1760), p. 217.

9. For alleged failure to summons a juror to Provincial Court; sheriff attached to answer same. Liber D.D. 2 (1761-1762), p. 362.

10. For defaults in sumoning two jurors (two cases) to Provincial Court; sheriff sumomned to court to answer same. Liber D.D. 3 (1762-1763), pp. 131, 132.

11. For failure by sheriff to return sufficient number of jurors to Provincial Court; sheriff summoned to court to answer same. Id., p. 144.

12. For return by two sheriffs of an improper juror to Provincial Court; each sheriff summoned to court to answer same. Id., p. 144.

13. For failure by sheriff to summon proper juror to Provincial Court; sheriff summoned to court to answer same, later discharged, paying fees. Liber D.D. 4 (1763), p. 119.

14. For failure of sheriff to return a sufficient number of jurors to Provincial Court; sheriff summoned to court to answer same. Id., p. 154.

15. For return by sheriff of improper persons (wit-

nesses) to serve as jurors in Provincial Court; discharged, upon payment of fees. Id., pp. 154-55.

16. For return by sheriff as a juror in Provincial Court a person not served in accordance with the statute; sheriff fined 200 pounds of tobacco. Liber D.D. 12 (1767), p. 633.

17. For failure by sheriff to return to Provincial Court list of jurors and process directed to him; sheriff attached for contempt. Liber D.D. 20 (1774-1776), sub October 13, 1774.

18. For failure of sheriffs to file proper returns of jurors (two cases); each sheriff fined 20 shillings. Liber J.G. 13 (1791), p. 7; Liber J.G. 15 (1792), p. 2 (General Court, Western Shore).

D. *Refusal to Serve as Court Officers*

1. For refusal by two persons to serve as commissioners; fined by Provincial Court according to statute. 65 Arch. Md. 370 (1670-1675).

2. For refusal of two persons to take oath as commissioner; fined 1000 pounds of tobacco each by Provincial Court. 66 Arch. Md. 281 (1675-1677).

3. Upon presentment for refusal to accept commission as justice of the peace in Kent County; fined 500 pounds of tobacco by Provincial Court. Liber T.L., No. 1 (1694-1696), p. 501.

4. For failure of constable to assume duties; discharged, paying fees, upon showing that he did not have notice of appointment. Liber D.D. 13 (1767-1768), p. 89.

E. *Failure to Comply with Process*

1. For failure of three sheriffs to produce defendants in court; one sheriff amerced amount of debt and costs

of action, two sheriffs had judgments entered against them for the amount of the debts and costs of the actions. Liber D.D. 17 (1770-1771), pp. 5, 270, 273.

2. The docket entries of the Provincial Court for the period 1768-1776 shows numerous instances where sheriffs were amerced varying amounts of money, including one amercement in 1771-1722 for 37 pounds current money, apparently for failure to produce body of defendant upon a return of *cepi* to a *capias ad respondendum*. Liber D.D. 14 (1768), p. 573 ff; Liber D.D. 15 (1768-1769), p. 128 ff; Liber D.D. 16 (1769-1770), pp. 133 ff and 484 ff; Liber D.D. 17 (1770-1771), pp. 73 ff, 347 ff and 663 ff; Liber D.D. 18 (1771-1772), pp. 152 ff and 463 ff; Liber D.D. 19 (1773-1774), pp. 107 ff, 474 ff and 608 ff; Liber D.D. 20 (1774-1776), pp. 95 ff, 265 ff and 410 ff.

IV. Extension of Laws of England to Colony or State

1. The 1632 royal charter to Caecilius Calvert, Lord Baltimore, provided in Article X thereof that all subjects transplanted to the province or their descent should be "Natives and Liege-Men" of the King, and have and possess freely, quietly and peaceably "all Privileges, Franchises and Liberties of this our Kingdog of England" to use and enjoy in the same manner as Liege-Men born or to be born within the Kingdom of England. Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws, Vol. 3, pp. 1677, 1681 (1909). As to the significance of this provision, see the following recent comment:

> "The somewhat enigmatic provision that the settlers and their descent should be regarded as

English subjects and have all the privileges, franchises, and liberties of the kingdom of England in the same manner as subjects within the kingdom became a rallying point in the struggle of the inhabitants against proprietary pretensions. However, upon some occasions, the settlers relied upon an inherent right or birthright theory, or upon the extension of the provisions of Magna Carta to the Province by an act of Assembly." Smith, The Foundations of Law in Maryland: 1634-1715, in Law and Authority in Colonial America: Selected Essays (ed. Billias 1965), pp. 92, 94.

2. The dispute as to the "rule of judicature" in the early years of Maryland is commented upon by Smith, *op. cit. supra,* pp. 92, 98, as follows:

"Maryland's charter made no provision for wholesale extension to the colony of the laws and customs of England, including acts of Parliament. At the time of settlement there was no judicial authority with respect to the extension of the laws of England to a territory such as Maryland, unsettled except for the Indians, yet not a conquered country. The general attitude in the Province was that, by executive or legislative action, some or all of the laws of England might be received as the colonists saw fit, saving those privileges and rights guaranteed by the charter. The distinction between acts of Parliament passed prior to Maryland's settlement and those later enacted was not current in the seventeenth century. In any event, it was generally accepted that, unless otherwise specifically provided, the courts should be guided in the first instance by acts of the Assembly or general usage. A divergence of views developed as to the 'rule of judicature' if the laws of the province

were silent. At least four basic views appear in a succession of acts and in legislative debates during the proprietary period: (1) the court was free to exercise its discretion—but since the proprietary controlled the judiciary this view found little favor in the House of Delegates; (2) the court was free to exercise its discretion including due consideration of the applicable laws of England; (3) the court was to judge by those laws of England not inconvenient to the Province or not inconsistent with its condition; and (4) the court was to judge by the laws of England without any discretion as to applicability. The fourth view ultimately prevailed in the proprietary period and was adopted in the early years of royal government, although the exact scope of the rule is vague. However, by reason of repeals and disallowance, for much of the period of royal rule no statutory rule of judicature existed."

3. Judicial commissions to the Provincial Court in the royal period followed in large part the format of the English commission to the justices of the peace and granted broad powers to hold pleas touching upon the conservation of the peace and common pleas, according to the laws and customs of England and of the province. See Liber D.S., No. C, pp. 10-11, 38-40, 49-50, 323; Liber T.L., No. 1, pp. 1-2, 120-22; Liber H.W., No. 3, p. 131; Liber W.T., No. 3, pp. 1-3, 612-14; Liber W.T., No. 4, pp. 165-68; Liber T.B., No 2, p 65; Liber P.L., No. 1, p. 233. For a 1697 commission of oyer and terminer, to hear and determine according to the laws, orders and customs of England and of the Province, see Liber H.W., No. 3, p. 263.

4. During the period 1722-1732, the Lower House and

the Proprietor were engaged in a running dispute over whether acts of Parliament, general in nature, should be regarded as *ipso facto* extending to the Province. The struggle is described in detail in Sioussat, The English Statutes in Maryland, Johns Hopkins University Studies in History and Political Science, Series XXI, Nos. 11-12 (1903). The significance for the instant purpose lies in the acceptance by both sides that the common law of England extended to the Province. A famous series of resolutions passed the Lower House on October 25, 1722. The three of greatest impact concerned (1) the form of the judicial commissions; (2) the rejection of the concept that Maryland could be regarded as a conquered country under the English reception cases (it required an act of the King to extend any or all of the laws of England to a conquered country); and (3) that the law of the Province had always consisted of the common law, acts of Parliament of general application, and acts of Assembly.

The resolution on the judicial commissions (34 Md. Arch. 440) reads as follows:

> "And that it be an Instruction to the said Committee [Committee of Aggreivances] as a Committee of Courts of Justice that they observe the Nature of all the Commissions of the Severall Courts of Judicature within this province and that they Especially observe any alterations that may at Any Time happen by Accidentall Omissions or Otherwise therein and particularly relating to such Words therein as require the Severall Judges and Justices to hear, Try and Determine According to the Laws Statutes Ordinances and reasonable Customs of England and of this province, or to

such other words as have relation thereto, and that they shall immediately make a report to the House of any alterations that shall at any Time happen in Such Commissions, and likewise to have regard as near as may be to observe wherein they differ from the terms of the Severall Sorts of Comission to the Judges and Justices in England."

The resolution on the elements of the law of the Province (34 Md. Arch. 441) reads as follows:

"Resolved further that this province hath allwaies hitherto had the Common Law and such General Statutes of England as are not restrained by words of Locall Limitation in them, and such Acts of Assembly as were made in the Province to Suite its particular Constitution as the rule and Standard of Government and Judicature, such Statutes and Acts of Assembly being subject to the like Rules of Common Law or Equitable Construction as are used by the Judges in Construing Statutes in England which happy rules have by his Majesty and his Royall Ancesters, And Also by his Lordship and his Noble Ancestors or Some of them been hitherto Approved by Having the Comissions of Judicature to include Directions of that Nature to the Severall Judiciall Magistrates unless those Words have at any time been Casually or Carelessly omitted by the Officers in this Province that drew such Commissions. . . ."

This same series of resolutions was adopted in substantially the same form on a number of later occasions until 1771. See 35 Md. Arch. 309-10 (1725); 40 id. 282-84 (1739); 42 id. 320-22 (1742); 44 id. 69-70 (1745); 44 id. 256-58 (1746); 46 id. 235-37 (1750); 46 id. 651-53 (1751); 50 id. 596-98 (1754); 55 id. 207-08 (1757); 56

id. 16-18 (1758); 58 id. 72-74 (1762); 59 id. 134-35 (1765); 61 id. 330-31 (1768); 63 id. 80-81 (1771).

The form of the judicial oath also constituted a facet of the controversy as to the status to be accorded acts of Parliament of a general nature (or, as sometimes expressed, "securative of the Rights and Liberties of the Subject"). In 1727 the Assembly enacted a bill, vetoed by the proprietor, that the judges were to proceed "according to the Directions of the Acts of Assembly of this Province so far as they provide, And where they are silent, according to the Laws, Statutes, and reasonable Customs of England, agreeable to the Usage and Constitution of this Province." 36 Md. Arch. 81. Another attempt in 1730, also vetoed, directed the judges to proceed "according to the Directions of the Acts of Assembly of this Province, so far as they provide, and where they are silent, according to the reasonable Customs of England, and the Laws and Statutes thereof, as are or shall hereafter be Enacted, agreeable to the Usage or Constitution of this Province." 37 id. 151. Finally, in 1732, a proposed form of oath escaped veto; it directed the judges to proceed "according to the Laws, Customs, and Directions, of the Acts of Assembly of this Province, so far forth as they provide, and where they are silent, according to the Laws, Statutes, and reasonable Customs of England, as used and practised within this province." 37 id. 518-19.

5. Several acts establishing assizes to be held by the judges of the Provincial Court provided that such judges have power to hear and determine certain civil causes as fully and amply as any Justices of Assize and Nisi Prius in England used or by law ought or might

try, hear and determine. They were also granted power to try criminal causes as fully and amply as such offenses might have been tried, heard and determined by the Provincial Court or any Court of Oyer and Terminer and Goal-Delivery according to the laws of England and the province. Such justices were also given power to make rules and orders which were to be agreeable to the laws of England and the province. 36 id. 565-67 (1723); 37 id. 523-26 (1732); 42 id. 398 (1742); 44 id. 588 (1747); 50 id. 275 (1753); 61 id. 75 (1766).

6. The Declaration of Rights contained in the Constitution of Maryland, adopted in 1776 (Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws, Vol. 3, p. 1686), provided:

> "III. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great-Britain, and have been introduced, used and practised by the courts of law or equity; and also to acts of Assembly, in force on the first of June, seventeen hundred and seventy-four. . . ."

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempts*

1. For attorney falsifying a writ issued by the court; disbarred from practice by Provincial Court. 65 Arch. Md. 50 (1670-1675).

2. For juror disclosing verdict before its return to

Provincial Court; fined 500 pounds of tobacco. 65 Arch. Md. 440 (1670-1675).

3. For juror falsely serving in the name of another person; upon submission to Provincial Court, dismissed with warning. Liber T.B., No. 2 (1705-1706), p. 71.

4. For contempt of court (not specified); fined 2000 pounds of tobacco. Liber R.B. 2 (1729-1731), p. 173 (Provincial Court).

5. For assaulting a deputy sheriff and removal of a prisoner from his custody; fined 50 pounds current money after trial by Provincial Court Jury. Liber E.I. 1 (1734-1735), p. 385.

6. For having assaulted and hindered a marshal of the Court of Vice-Admiralty in the execution of his duties; fined 20 shillings current money. Liber E.I. 7 (1742-1744), p. 314 (Provincial Court).

7. For contempt (unspecified); attached, but later defendant discharged, paying fees. Liber E.I. 10 (1745-1748), p. 231 (Provincial Court).

8. For inducing two witnesses to leave court before testifying; defendant ordered to show cause and attorney general ordered to issue an information against him. Liber E.I. 13 (1751), pp. 475, 838 (Provincial Court).

9. For interfering with constable in the execution of his duties; fined ten pounds current money, one half of which was to go to the informer. Liber E.I. 15 (1753-1754), p. 166 (Provincial Court).

10. For misbehavior of a Provincial Court juror; fined 40 shillings. Liber B.T. 3 (1757-1759), p. 888.

11. For a certain trespass, contempt and misdemeanor by seven persons; each fined in varying

amounts of from two shillings to two pounds current money. Id., pp. 892-895 (Provincial Court).

12. For attempt by justice of peace to extort a confession by assault; after presentment, defendant submitted and was fined 100 pounds current money by Provincial Court. Liber D.D. 2 (1761-1762), p. 370.

13. For refusing sheriff access to house to serve process against another; sheriff ordered to take defendant into custody to answer such misdemeanor. Later, defendant was discharged. Liber D.D. 5 (1762-1764), p. 300.

14. For five jurors departing the jury room before reaching verdict; each fined six shillings by Provincial Court. Liber D.D. 16 (1769-1770), p. 414.

15. For misinforming two petit jurors as to the time for their attendance in court; fined three pounds. Liber J.G. 13 (1791), p. 7 (General Court, Western Shore).

16. For refusal by two persons to comply with the "common rule" which they entered into with others in two lawsuits (2 cases); attachments for contempt issued. Liber J.G. 23 (1794), p. 1; id., J.G. 25 (1794), p. 9 (General Court, Western Shore).

B. *Defamation or Abuse of Court or Court Officials*

1. For speech defaming the government and justice of the province; imprisoned without bond for three weeks by Provincial Court. 4 Arch. Md. 265 (1643).

2. For interfering with sheriff in the performance of his duties and uttering contemptuous words in the process; fined 2000 pounds of tobacco to the proprietor and 500 pounds of tobacco to the Lieutenant-Governor. 4 Arch. Md. 434, 436-37 (1648) (Provincial Court).

3. For speaking opprobrious words in Provincial

Court against a former Lieutenant-Governor; fined 300 pounds of tobacco and committed during the Governor's pleasure, but, upon submission, fine remitted and defendant discharged. 10 Arch. Md. 26 (1649/50).

4. For assault by husband and wife upon sheriff and rescue of goods taken in execution of attachment; Provincial Court ordered each to be whipped 40 stripes, but wife's punishment remitted due to her pregnancy. 57 Arch. Md. 198-99 (1667).

5. For assaulting justice out of court and for resisting arrest by constable; after defendant was indicted and confessed fault, he was ordered by Provincial Court to put up security for charges and be of good behavior during the court's pleasure. 57 Arch. Md. 309-10 (1668).

6. For assaulting sheriff; after praying for mercy of Provincial Court, fined 6s., 8d. 57 Arch. Md. 453 (1666-1670).

7. For libeling the court and government; fined four pounds current money by Provincial Court. Liber E.I. 2 (1735-1737), p. 160.

8. For allegedly telling a justice of the peace that the latter would render any judgment for a small bribe; found not guilty by a Provincial Court jury. Liber E.I. 5 (1738-1739), p. 135.

9. For allegedly falsely and contemptuously shouting that a justice of the peace had not rendered him justice in a case; case returned by Provincial Court to County Court because offender who requested a jury trial did not enter into recognizance for due prosecution of writ. Liber E.I. 6 (1739-1741), p. 427.

10. For "abusing" one of the magistrates of the Pro-

vincial Court; fined 500 pounds of tobacco for the use of the free schools. Liber E.I. 10 (1745-1748), p. 64.

C. *Misconduct in Court*

1. For defendant's leaving the court room "in contempt of court"; judgment for plaintiff. 4 Arch. Md. 158 (1642) (Provincial Court).

2. For reproaching Provincial Court in an insolent manner; fined 1000 pounds of tobacco. 4 Arch. Md. 183-184 (1642).

3. For swearing in the presence of Provincial Court; fined five pounds of tobacco. 4 Arch. Md. 188 (1642).

4. For striking a person near the entrance of the court; fined 500 pounds of tobacco by Provincial Court, but fine remitted upon submission. 10 Arch. Md. 136 (1649/50).

5. For being intoxicated in Provincial Court; fined 500 pounds of tobacco, but later remitted. 10 Arch. Md. 202 (1649/50).

6. For swearing in Provincial Court by two persons; each fined 20 pounds of tobacco. 10 Arch. Md. 221 (1649/50).

7. For swearing several times in presence of Provincial Court; fined 30 pounds of tobacco. 10 Arch. Md. 558 (1657).

8. For being intoxicated in Provincial Court; fined 100 pounds of tobacco. 65 Arch. Md. 29 (1670-1675).

9. For behaving "indecently" before a magistrate; discharged by the Provincial Court in a certiorari proceeding. Liber E.I. 9 (1744-1745), p. 156.

10. For indecent behavior in court; Provincial Court

ordered that offender be placed in the stocks. Liber D.D. 13 (1767-1768), p. 43.

D. *Failure to Assist Court Officers*

1. For refusing to aid sheriff in the apprehension of a pirate who return to Province in contempt of a conciliar order; fined 500 pounds of tobacco and whipped. 41 Arch. Md. 333 (1659) (Provincial Court).

2. For refusing to assist sheriff in apprehending a pirate who returned to the Province in contempt of a conciliar order; fined 1000 pounds of tobacco. 41 Arch. Md. 339 (1659) (Provincial Court).

E. *Refusal to Serve as Court Officers*

1. For refusal to take oath as constable; imprisoned for six months by Provincial Court. 41 Arch. Md. 418 (1660).

F. *Failure to Perform Official Duties*

1. For constable improperly releasing a prisoner; fined 1000 pounds of tobacco by Provincial Court. 41 Arch. Md. 333 (1659).

2. For refusal by constable to serve warrant; upon submission, fined 12d. by Provincial Court. 65 Arch. Md. 14-15, 19 (1670-1675).

3. For failure of sheriff to attend Provincial Court; fined five pounds. Liber T.L., No. 2 (1698-1699), p. 82.

4. For failure of sheriff of Baltimore County to attend Provincial Court; fined 500 pounds of tobacco, but fine later remitted. Liber P.L., No. 7 (1722-1724), p. 2.

5. For failure of justice of the peace to certify a recognizance in a theft case; fined five pounds current

money upon a special verdict by jury in Provincial Court. Liber E.I. 1 (1734-1735), p. 265.

6. For non-attendance by sheriff at Provincial Court; fined 500 pounds of tobacco. Liber E.I. 7 (1742-1744), p. 108.

7. For failure of sheriff to execute warrant; bench warrant issued against sheriff so that he might be brought before Provincial Court to answer same, later discharged after answering. Liber E.I. 13 (1751), pp. 476, 821.

8. For sheriff allowing two prisoners to escape; bench warrant issued by Provincial Court for sheriff to answer for the occurrence. Id., p. 800.

9. For failure of sheriff to attend Provincial Court and for failure to make a certain return; sheriff attached, later discharged, paying fees. Liber B.I. 5 (1759-1760) p. 515.

10. For misbehavior of sheriff in discharging juror in Provincial Court; subpoena issued to sheriff to show cause why he should not be fined. Id., p. 530.

11. For non-attendance at Provincial Court by three sheriffs (two cases); each sheriff fined 200 pounds of tobacco. Liber D.D. 12 (1767), p. 3.

12. For non-attendance at Provincial Court by 16 constables; subpoenas issued to defaulters to answer the same. Liber D.D. 12 (1767), pp. 642, 643, 655, 661, 672, 674, 679. Two of the constables were fined 20 shillings each. Id., p. 674.

13. For failure of justice to attend Provincial Court; subpoena issued to justice to show cause for such default. Liber D.D. 13 (1767-1768), p. 14. Later, he was discharged. Liber D.D. 14 (1768), p. 634.

14. For non-attendance at Provincial Court by 21 constables; subpoenas issued to constables to show cause for such defaults. Id., pp. 23-24, 71-72, 77, 78, 82.

15. For failure of 22 constables to attend Provincial Court; summons issued, and seven constables fined 10 pounds of tobacco each, eight constables discharged, and disposition of the five other cases not shown. Liber D.D. 14 (1768) pp. 644, 645, 646, 684.

16. For failure of 3 constables to attend Provincial Court; summons issued, and one constable subsequently fined 20 pounds of tobacco. Liber D.D. 15 (1768-1769), pp. 39, 45-46.

17. For non-attendance by sheriff at General Court (two cases); sheriff attached. Ms. Minute Book (1778-1781) Sept. Term, 1778, Oct. Term, 1780 (General Court, Eastern Shore).

18. For bailiff departing court and failing to attend grand jury; attachment for contempt. Ms. Minute Book (1794), Sept. Term, 1794 (General Court, Eastern Shore).

19. For non-attendance by seven sheriffs at sessions of the General Court (six cases); four sheriffs fined ten pounds each, and three attached. Liber D.D. 20 (1774-1776), pp. 452, 453, 456, 495; Liber D.D. 21 (1775-1778), p. 358 (General Court, Western Shore).

20. For magistrates' failure to return a recognizance; attached for contempt. Liber D.D. 20 (1774-1776), p. 455 (General Court, Western Shore).

G. *Failure to Comply with Process*

1. For defendant's non-appearance in Provincial Court in a civil action; court found defendant guilty

of contempt of court (no punishment specified). 10 Arch. Md. 106-08 (1649/50).

2. For failure of defendant to appear in defamation case; sheriff ordered to take defendant into custody until he gave security for appearance at the next Provincial Court. 10 Arch. Md. 491 (1656/7).

3. Upon presentment in Provincial Court for refusing to obey a constable; discharged. 57 Arch. Md. 615 (1666-1670).

4. For refusing to return writ; coroner fined 40 shillings by Provincial Court. 65 Arch. Md. 62 (1670-1675).

5. For failure by two sheriffs to return writs to Provincial Court; amerced five pounds sterling each. 65 Md. Laws 299 (1670-1675).

6. For officer's failure to make return of inquisition; fined 2000 pounds of tobacco by Provincial Court. 66 Arch. Md. 289 (1675-1677).

7. For disobedience to writ of habeas corpus by justices of Ann Arundel County Court; recommended to appear and answer for contempt at Provincial Court. Liber D.S., No. A (1684-1687), pp. 37, 211.

8. For failure of sheriff of Charles County to return writs to Provincial Court; fined 2500 pounds. Liber I.L. (1698), p. 8.

9. For failure of sheriff to return writ to Provincial Court; fined an unspecified amount. Liber W.T., No. 3 (1699-1701), p. 9.

10. For failure of coroner to return writ to Provincial Court in action of debt by crown; amerced 40 shillings. Liber P.L., No. 2 (1707-1709), p. 363.

11. For failure of sheriffs to return writs to Provin-

cial Court; fined unspecified amount. Liber P.L., No. 4 (1718-1719), p. 241.

12. For failure of sheriff to return writ to Provincial Court; sheriff to be attached for contempt. Liber P.L., No. 2 (1722-1724), p. 410.

13. For failure of sheriff to return writs to Provincial Court; fined 1000 pounds of tobacco. Liber W.G. 2 (1724-1726), p. 115.

14. For failure of sheriff to bring in the body of defendant upon return of *cepi* to *capias;* amerced 38 pounds, 8 shillings and seven pence by Provincial Court. Liber R.B. 2 (1729-1731), pp. 262, 362.

15. For failure of sheriff to bring in body of defendant upon return of *cepi* to *capias* in Provincial Court; amerced twenty pounds, 1 shilling and 9 pence. Liber W.G. 3 (1732-1733), p. 21.

16. For disobedience of summons in a civil action in Provincial Court; attached for contempt. Liber E.I. 5 (1738-1739), p. 171.

17. For refusal by justices of Calvert County to allow certiorari to issue out of the Provincial Court in a certain case, and for disobeying the certiorari; attached for contempt, reprimanded, and later discharged, paying fees. Liber E.I. 11 (1748-1749), p. 1. Two justices of Calvert County who dissented from the action taken were discharged. Id., p. 2.

18. For failure by sheriff to produce defendant in Provincial Court upon a return of *cepi* to a *capias;* amerced the damages in the action. Liber E.I. 11 (1748-1749), p. 153.

19. For failure of sheriff to execute warrant of Pro-

vincial Court; sheriff ordered to show cause. Liber E.I. 13 (1751), p. 468.

20. For failure of sheriff to produce defendant in Provincial Court upon *cepi* return to *capias;* amerced four pounds current money. Liber B.T. 5 (1759-1760), p. 828.

21. For failure by sheriff to return attachment for contempt to Provincial Court; sheriff ordered to appear and show cause for such default. Liber D.D. 3 (1762-1763), p. 145.

22. For failure by sheriff to bring into Provincial Court the body of defendant upon return of *cepi* to *capias*—at eight successive terms of court; amerced 40 shillings for each of the first two defaults, and 5 pounds for each of the remaining defaults. Later, amercements remitted when sheriff produced defendant in court. Liber D.D. 5 (1762-1764), p. 137.

23. For failure of sheriff to make return on writ of replevin issued out of High Court of Chancery; attached for contempt by Provincial Court. Liber D.D. 10 (1765-1766), p. 78.

24. For failure of sheriff to produce defendant in Provincial Court upon return of *cepi* to *capias;* sheriff amerced damages and costs, and afterwards amercement was stricken. Liber D.D. 12 (1767), p. 23.

25. For failure of sheriff to produce constable and juror, each of whom had been attached for contempt (two cases); sheriff amerced 20 shillings until he produced each. Id., p. 675.

26. For failure by sheriff to return summons for a witness in Provincial Court; fined 1,000 pounds of tobacco. Liber D.D. 14 (1768), p. 35.

27. Criminal docket shows that a sheriff had been amerced by the Provincial Court two shillings and six pence in a case where a witness had been attached for non-attendance. Liber D.D. 16 (1769-1770), p. 513, and Liber D.D. 17 (1770-1771), p. 103.

28. A docket entry shows several instances where sheriffs were amerced varying amounts of money, apparently for failure to produce body of defendant upon a return of *cepi* to a *capias*. Liber D.D. 12 (1767), p. 553 ff.

29. For refusal to obey writ of habeas corpus concerning a particular negro; attached for contempt. Ms. Minute Book (1790-1791), Sept. Term, 1791 (General Court, Eastern Shore).

30. For failure of sheriffs in 89 cases to produce defendants in court upon *cepi* return; amerced from 20 to 2000 pounds current money. Liber 66 T.B.H. 1 (1779-1780), pp. 14-16, 110, 260, 383, 416-20, 612-19 (General Court, Western Shore).

31. For failure of sheriffs in 82 cases to produce defendants in court upon *cepi* return; amerced from 5 to 400 pounds current money until they produced the defendants. Liber T.B.H. 2 (1781-1782), pp. 31-37, 237-44 (General Court, Western Shore).

32. For failure of sheriff to bring defendant into court upon *cepi* return; amerced 896 pounds, 11 shillings and 4 pence damages and costs of suit. Id., p. 469.

33. For failure by sheriffs in 42 cases to bring defendants into court; in 38 cases, sheriffs amerced from 20 to 1000 pounds of tobacco, and in one case sheriff ordered to pay debt and damages of 2539 pounds of tobacco. Liber T.B.H. 3 (1782), pp. 46-56; Liber J.G.

3 (1789), p. 19; Liber J.G. 25 (1794), pp. 556-57 (General Court, Western Shore).

34. For failure of sheriff to produce defendant in court (two cases) upon *cepi* return; sheriff amerced 304 pounds current money in one case, and in other case sheriff to be amerced debt and costs if he did not produce defendant. Liber I.E.D. (1787), pp. 600, 645 (General Court, Eastern Shore).

35. For failure of Chief Justice and associate justice of Charles County to obey certiorari from General Court to remove a certain defendant charged with murder to General Court; attachment for contempt issued. Liber J.G. 15 (1792), p. 20 (General Court, Western Shore). Later, the Chief Justice and two associate justices were each fined 20 shillings for their contempt. Liber J.G. 18 (1792), p. 220 (General Court, Western Shore).

36. For failure of sheriffs to return subpoena, a writ of ejection, etc. (three cases); each fined seven shillings and six pence. Ms. Minute Book (1799-1815), Sept. 12, 1799 (General Court, Eastern Shore).

H. *Failure to Obey Court Rules or Orders*

1. Defendant ordered not to violate a particular Provincial Court order, and, if he showed contempt in this particular, he was to be dealt with by the court. 10 Arch. 218 (1649/50).

2. The commissioners of Anne Arundel County were ordered to fine persons who refused to deliver accounts of certain estates belonging to orphans. 41 Arch. Md. 295 (1659).

3. For non-attendance at Provincial Court by two

attorneys; each fined 400 pounds of tobacco. 65 Arch. Md. 311 (1670-1675).

4. For attorney's violation of Provincial Court order directing the time in which to speak; fined 100 pounds of tobacco. 65 Arch. Md. 585 (1670-1675).

5. Provincial Court ordered that sheriffs make return of writs by 9 a.m. of the first day of each court upon penalty of fine of 2,000 pounds of tobacco. 66 Arch. Md. 390-391 (1675-1677).

6. Three entries appearing in the Provincial Court records for the period 1677-1680 show that on ten occasions sheriffs were fined 2,000 pounds of tobacco each for failure to make timely return of writs. 67 Arch. Md. 47, 436 (1677-1678); 69 Arch. Md. 133 (1678-1680).

7. For non-attendance at Provincial Court by court crier; fined 500 pounds of tobacco. Liber D.S., No. A (1684-1687), p. 289.

8. For failure to obey court order of Provincial Court; attachment issued and contemnor to put up twenty pounds security for good behavior until the next court. Liber V.D., No. 2 (1716-1717), pp. 42, 69. The attachment was continued and later stricken. Id., p. 367, 618.

9. For non-attendance by attorney at Provincial Court; fined 250 pounds of tobacco. Liber V.D. No. 2 (1716-1717), p. 63. The court ruled that non-attendance by attorneys was to be dealt with by fine not to exceed 1000 pounds of tobacco.

10. The Provincial Court gave notice that it would institute contempt proceedings against any magistrate who failed to comply with the court's rule requiring

the transmittal of recognizances to that court. Liber P.L. No. 7 (1722-1724), p. 123.

11. For failure of attorneys (two cases) to attend Provincial Court; fined 100 and 300 pounds of tobacco, respectively. Liber W.G. 2 (1724-1726), p. 485.

12. For non-payment of costs of action in Provincial Court; attachment for contempt issued. Liber R.B. 1 (1727-1728), p. 371.

13. For failure of sheriff to make timely return of writs to Provincial Court; fined 1000 pounds of tobacco. Liber W.G. 3 (1732-1733), p. 192; see also p. 191.

14. For failure of five sheriffs to make returns agreeable to rules of Provincial Court; each fined 1000 pounds of tobacco, but afterwards they were excused from the fines. Liber E.I. 2 (1735-1737), p. 223.

15. For failure of party to pay costs to Provincial Court; attached for contempt. Liber E.I. 4 (1737-1738), p. 458.

16. For failure by sheriff to make timely return of writs in Provincial Court and for non-attendance at court; excused upon appearance and showing cause. Liber E.I. 6 (1739-1741), p. 2.

17. For failure of plaintiff to pay costs of action in Provincial Court; attached for contempt, but plaintiff later paid amount due. Liber E.I. 5 (1738-1739), pp. 166, 417.

18. For failure to pay costs in civil action in Provincial Court; attachment issued. Id., p. 427.

19. For failure to pay witness fees in Provincial Court action; three attachments for contempt issued. Liber E.I. 7 (1742-1744), pp. 162-63.

20. For failure of party to pay costs in Provincial

Court; attached for contempt, but attachment stricken when defendant paid costs. Id., p. 453.

21. For disobedience of guardian to Provincial Court order; guardian attached, and appeal from County Court dismissed. Liber E.I. 10 (1745-1748), p. 331.

22. For failure to pay witness fees in Provincial Court; defendant attached, later discharged on motion of the witness. Liber E.I. 14 (1751-1753), pp. 356, 724.

23. For failure to pay court costs in Provincial Court; defendants attached for contempt, later discharged. Liber G.S. 1 (1755), p. 413.

24. For failure to pay witness fees in Provincial Court; attached for contempt. Id., p. 491.

25. For failure to pay witness fees (three cases); defendants attached for contempt. Liber B.T. 3 (1757-1759), pp. 558, 876, 887.

26. For refusal to pay witness fees in Provincial Court; defendants attached for contempt to answer same. Liber B.T. 5 (1759-1760), pp. 228, 816.

27. For failure of three parties to pay witness fees in Provincial Court; attached for contempt to show cause for default. Liber D.D. 1 (1760-1761), p. 523; Liber D.D. 2 (1761-1762), p. 89; Liber D.D. 3 (1762-1763), p. 140.

28. For failure by two parties to pay witness fees in Provincial Court; each party attached for contempt. Liber D.D. 4 (1763), p. 142; Liber D.D. 5 (1762-1764), p. 290.

29. For refusal to obey Provincial Court order directing the return of a negro; attached for contempt. Liber D.D. 6 (1764), p. 293.

30. For failure by deputy sheriff to obey Provincial

Court order that he preserve order and decorum in court; fined 1,000 pounds of tobacco, and ordered committed until fine paid. Liber D.D. 6 (1764), p. 297.

31. For failure by five sheriffs to make refunds according to Provincial Court order and rule; each fined 500 pounds of tobacco but remitted. Liber D.D. 13 (1767-1768), p. 2.

32. For failure of husband and wife to pay a third party some money and tobacco (presumably a party to a civil cause); each attached for contempt. Id., p. 3.

33. For failure of two parties to carry out an agreement entered into by them in Provincial Court; attached for contempt. Liber D.D. 14 (1768), pp. 1-2.

34. For failure by party to pay witness fees; ordered by Provincial Court to show cause for such default. Id., p. 214.

35. For failure to pay witness fees in Provincial Court; party summoned to show cause for such default. Liber D.D. 15 (1768-1769), p. 163.

36. For resisting constable in the execution of his duties; presentment transmitted by Provincial Court to County Court. Liber D.D. 16 (1769-1770), pp. 33, 37.

37. For failure to pay witness fees pursuant to court order; criminal docket shows that defendant committed until fees were paid. Id., p. 513.

38. For failure of two parties to pay witness fees; attached for contempt, no penalties assessed. Ms. Judgment Book (1778-1782), pp. 247-248 (General Court, Eastern Shore).

39. For failure of two magistrates of Cecil County to obey ruling of General Court; attachment for contempt.

Ms. Minute Book (1778-1781) April Term, 1780 (General Court, Eastern Shore).

40. For interference with court orders (two cases); contemnors each fined three pounds current money. Ms. Judgment Book (Criminal) J.E. (1782-1786), pp. 72-73 (General Court, Eastern Shore).

41. For failure of three persons to obey order of court that they deliver possession of land to third party; committed until they paid costs of the writ and complied with court order. Liber T.B.H. 3 (1782), p. 8 (General Court, Western Shore).

42. For failure to pay money to others in violation of court orders (two cases); attachments for contempt issued. Ms. Minute Book (1786-1787) May Term, 1786; Ms. Minute Book (1788-1789), April 15, 1788 (General Court, Eastern Shore).

43. For refusal to pay witness fees (two cases); parties attached for contempt. Ms. Minute Book (1788-1789), April 28, 1789; Sept. 26, 1789, (General Court, Eastern Shore).

44. For refusal to obey court order to deliver goods taken by execution; attached for contempt. Ms. Minute Book (1790-1791), Sept. Term, 1791 (General Court, Eastern Shore).

45. For surveyor's disobedience of court order that he return plats; fined 20 shillings and ordered to pay defendant's costs. Ms. Minute Book (1792-1793) (General Court, Eastern Shore).

46. For failure to pay witness fees (three cases); each person attached for his contempt. Liber J.G. 7 (1790), p. 25; id., J.G. 11 (1791), pp. 3, 5, 7; id., J.G. 23 (1794), p. 2 (General Court, Western Shore).

47. For failing to obey court order in not delivering a certain negro; attached for contempt. Liber J.G. 15 (1792), p. 20 (General Court, Western Shore).

48. For refusal to pay costs of continuance of action, etc., as required by court order (two cases); attachments for contempt issued. Liber J.G. 23 (1794), p. 3; id., J.G. 25 (1794), p. 6 (General Court, Western Shore).

49. For failure to pay tobacco and/or money to named persons (five cases); each attached for contempt. Liber J.G. 36 (1797), p. 25; id., J.G. 37 (1797), p. 3; id., J.G. 41 (1798), p. 13; id., J.G. 47 (1800), p. 11 (General Court, Western Shore).

MASSACHUSETTS

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I. Judicial Establishment

Under the first Massachusetts Bay charter (1628-1684) the General Court, while primarily a legislative body (yet the only body specifically granted judicial powers in the charter), exercised original jurisdiction, both civil and criminal, and also review jurisdiction over the acts of the Court of Assistants and, to a lesser extent, of the County Courts and other inferior tribunals. The Court of Assistants (also known as the Great Quarter Court) at first exercised broad original jurisdiction, both civil and criminal, including exclusive jurisdiction in capital and criminal causes extending to life, member or banishment. It also exercised appellate jurisdiction over the Inferior Quarter Courts which later developed into the County Courts. Later an attempt was made to restrict the Court of Assistants to a largely appellate role, although original jurisdiction was retained over serious offenses. The County Courts in effect constituted the third level of the judicial hierarchy, having jurisdiction over civil causes and criminal causes not extending to life, member or banishment. The extant records of the General Court and the Court of Assistants were examined.

Under the second charter to Massachusetts Bay (1691-1776) the principal court of original jurisdiction, civil and criminal, was the Superior Court of Judicature and Court of Assize and General Gaol Delivery.

It also exercised appellate jurisdiction over Inferior Courts of Common Pleas and Courts of General Sessions of the Peace established in each county. The Governor and Council constituted the highest Court of appeal. All the extant records of the Superior Court and the Governor and Council were examined.

Following the Revolution a Supreme Judicial Court was established (1782) with substantially the same jurisdiction as the recent Superior Court of Judicature, Court of Assize and General Gaol Delivery. At the same time in each county there was established a Court of Common Pleas and a Court of General Sessions. All the extant records of the Supreme Judicial Court were examined.

Prior to 1692, when it was made part of the Province of Massachusetts Bay, the New Plymouth colony was a separate entity. Its developed judicial hierarchy consisted of the General Court, exercising judicial powers as well as legislative, the Court of Assistants, a judicial body, and several County Courts. The records of the General Court and the Court of Assistants were examined.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

Massachusetts Bay, First Charter Period

1. The Body of Liberties of 1641 provided that no man's person should be restrained or imprisoned before sentence, if he could put in sufficient security, bail or mainprize for his appearance and good behavior in the meantime, "unless it be in Crimes Capital, and Con-

tempts in open Court, and in such cases where some expresse act of Court doth allow it." Liberty No. 18, contained in the Colonial Laws of Massachusetts. Reprinted from the Edition of 1672, with the Supplements through 1686 (ed. W. H. Whitmore, 1890), Intro. p. 37.

New Plymouth Colony

1. The 1672 code in Chapter IV, Actions contained a provision substantially the same as Liberty No. 18 in the Massachusetts Bay Body of Liberties of 1641 (*supra*). The book of the General Laws of the Inhabitants of New Plymouth, reprinted in the Compact with the Charter and Laws of the Colony of New Plymouth (ed. Wm. Brigham, 1836) pp. 255-56.

Commonwealth of Massachusetts

1. A statute of July 3, 1782, established a Supreme Judicial Court with authority, *inter alia,* "to punish at the reasonable Discretion of the Court, all contempts committed against the Authority of the same." The Laws and Resolves of Massachusetts, 1782-83, p. 28.

2. A statute of March 12, 1784, established Courts of Probate within the several counties of the Commonwealth and provided, *inter alia,* that any "contempt of authority in any cause or hearing before any Judge of Probate, shall and may be punished in like manner, as such contempt of authority in any Court of Common Pleas may, or can by law be punished." Id., p. 617. The statute of July 3, 1782, establishing for each county a Court of Common Pleas invested such courts with jurisdiction in all civil actions of the value of more than forty shillings and empowered them, *inter alia,* "to do

and order whatsoever by the Constitution and Laws shall be their Duty to do." Id., 1782-83, p. 32. There was no specific reference to any contempt power.

3. A statute of March 4, 1800, established the Municipal Court for the Town of Boston with authority, *inter alia,* "to punish, at the reasonable discretion of the Court, and in like manner as other Courts may lawfully do, all contempts committed against the authority of the same." Id., 1798-99, p. 485.

B. *Defamation or Abuse of Court or Court Officials*

Massachusetts Bay; First Charter

1. The Laws and Liberties of Massachusetts of 1648 provided that "whosoever shal henceforth openly or willingly defame any Court of justice, or the Sentences or proceedings of the same, or any of the Magistrates or other Judges of any such Court in respect of any Act or Sentence therein passed, and being thereof lawfully convict in any General Court or Court of Assistants shall be punished for the same by Fine, Imprisonment, Disfranchisement or Bannishment as the qualitie and measure of the offence shall deserve.

"And if any Magistrate or other member of any court shall use any reproachfull, or un-beseeming speeches, or behaviour towards any Magistrate, Judge, or member of the Court in the face of the said Court he shall be sharply reproved, by the Governour, or other principal Judge of the same Court for the time being. And if the qualitie of the offence be such as shall deserve a farther censure, or if the person so reproved shall reply again without leave, the same Court may proceed to punish any such offender by Fine, or Imprisonment;

or it shall be presented to, and censured at the next superiour Court." The Laws and Liberties of Massachusetts (1648), p. 36; repeated in substance, with addition of a whipping penalty, in The Book of General Laws and Libertyes (1660), p. 143, and The General Laws and Liberties of the Massachusetts Colony (1672), p. 36. It has been advanced that the term "lawfully convict" indicated that formal process of indictment was required in cases of contempt committed out of the presence of the court. Haskins, *Law and Authority in Early Massachusetts,* p. 278 (1960). We believe that this phrase is equivalent to the "upon due proof made" language of the New Plymouth statute below, that is, by the oathes of two witnesses, the confession of the party, the view of the court, etc. Such language would not prevent use of attachment in the case of contempts committed outside the presence of the court.

2. The General Laws and Liberties of the Massachusetts Colony (1672), p. 61, provided that if any person "shall revile the Office or person of Magistrates or Ministers, as is usual with the Quakers, such person or persons shall be severely whipt, or pay the sum of five pounds."

New Plymouth Colony

1. An October 20, 1646 law imposed a fine of 10 shillings upon ny person casting contempt or reproach upon the marshal or any of his deputies by reason of or concerning his office. Records of the Colony of New Plymouth of New England (ed. David Pulsifer, 1861), Vol. 11 (Laws 1623-1682), p. 53.

2. A 1658 law, directed primarily against Quakers, provided that any freeman who spoke contemptuously of the General Court or of its laws was to lose his freedom of the corporation. Id., p. 107.

3. The 1672 code provided that whosoever defamed any court of justice, or any of the magistrates or judges of any court, in respect of any act or sentence therein found would, upon due proof made, be punished by the court or magistrates by fine, imprisonment, binding to the peace or good behavior, according to the quality and measure of the offense or disturbance. Compact, Charter and Laws New Plymouth, p. 249.

C. *Misconduct in Presence of Court*

Massachusetts Bay: First Charter

1. Liberty No. 20 of the Body of Liberties provided that, "[i]f any which are to sit as Judges in any other Court [*i.e.*, other than a "general Court"] shall demeane themselves offensively in the Court, the rest of the Judges present shall have power to censure him for it, if the cause be of a high nature it shall be presented to and censured at the next superior Court." Col. Laws Mass. 1672, Intro., p. 37.

New Plymouth Colony

1. A November 15, 1636 law provided that any person who departed any of his Majesty's courts before being dismissed was to be amerced 3 shillings sterling. Records of the Colony of New Plymouth of New England, *supra*, Vol. 11 (Laws 1623-1682), p. 13.

2. A September 1, 1640 law provided that any person taking tobacco while he was impanelled upon a jury was to forfeit 5 shillings for every such default, unless

the jury had given up its verdict, was not to give it until the next day or had departed the court by consent. Id., p. 36.

D. *Failure of Jurors to Attend Court*

New Plymouth Colony

1. A June 5, 1644 law imposed a forfeiture of 20 shillings upon any person warned to serve on the grand jury who failed to come and serve and take the oath of fidelity. Id., p. 43.

2. A 1658 law provided that if any person chosen on the grand jury refused to serve, he was to be fined 10 shillings for every court from which he was absent within the year for which he was chosen to serve; if he was absent for the whole year, he was to be fined 40 shillings. Id., p. 120.

3. The 1672 code, in Chapter VI (Presentments, Indictments, Jurors and Juries), provided that those refusing to serve on the grand inquest were to be fined 40 shillings; those absenting themselves from attending their service at any court to which warned were to be fined 10 shillings unless they gave sufficient reason for their absence. Compact, Charter and Laws, New Plymouth, 263.

Massachusetts Bay: Second Charter

1. An act passed on March 8, 1694-95 provided for fines not to exceed forty shillings for non-appearing grand jurors and for fines not to exceed twenty shillings for non-appearing petit jurors. Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, Vol. 1 (1869 ed.), p. 193.

2. An act of June 22, 1698 provided for "reasonable fines", which were not to exceed forty shillings, for jurors "making default" after having been "duely returned to serve" in the Superior Court of Judicature, Court of Assize and General Gaol Delivery. Id., Vol. 1, p. 335.

3. An act of November 29, 1716, provided for fines of not less than four pounds or more than six pounds for jurors who failed to appear at the Superior Court of Judicature, Courts of Assize and General Gaol Delivery, the Inferior Courts of Common Pleas and the General Sessions of the Peace. Id., Vol. 2, p. 61.

4. A law of April 23, 1742, provided for fines not to exceed forty shillings for any non-appearing petit juror, the fines "to be divided between the petit jurors, drawn as aforesaid and serving at such court." Id., Vol. 2, p. 1090.

5. An enactment of August 12, 1749, provided for fines not to exceed forty shillings for non-attending petit jurors; and for fines not to exceed twenty pounds for non-attendance at the Superior Court of Judicature of jurors from Boston. Id., Vol. 3, p. 474. In 1756, the latter fine was reduced to ten pounds, and the limitation of the Superior Court removed. Id., Vol. 3, p. 995.

6. By a March 29, 1760 act, fines for non-attendance of petit jurors were set at thirty shillings, and, for jurors resident in Boston, ten pounds, and the limitation to the Superior Court reinstated. Id., Vol. 4, p. 318.

7. By statute of November 1, 1775, non-appearance for jury duty at admiralty courts established at three sites in Massachusetts authorized such courts to fine the

defaulting parties not to exceed forty shillings. Id., Vol. 5, p. 436.

Commonwealth of Massachusetts

1. By Statute of June 21, 1784, non-appearance of grand jurors at the sessions of the Supreme Judicial Court authorized the court to impose fines of five pounds upon inhabitants of Boston, Salem or Newburyport, and, if not inhabitants of those towns, fines of forty shillings, to be divided among those who attended as grand jurors. The Laws and Resolves of Massachusetts, 1784-1785, p. 10. A similar provision, for General Sessions, with fines of ten pounds, twenty pounds, five pounds and forty shillings, was also included in the statute. Ibid.

2. By statute of June 26, 1784, non-attendance of petit jurors authorized the courts to impose fines of five pounds if the defaulting jurors were inhabitants of Boston, Salem or Newburyport, or, if not inhabitants of such towns, fines of forty shillings, "which fines shall be equally divided amongst the Jurors who attend their duty." Id., 1784-1785, p. 15.

3. By statute dated March 10, 1797, non-attendance of grand jurors before the Supreme Judicial Court subjected such individuals to forfeitures of ten dollars "to be recovered and applied in the same manner as fines are, which are incurred by grand Jurors, by the Law of this Commonwealth." Id., 1796-1797, p. 178.

E. *Failure of Witnesses to Appear or Testify*
Commonwealth of Massachusetts

1. A statute of October 30, 1784, provided that non-appearance at any of the courts or before any justice

of the peace by a witness duly summoned to appear made the defaulting party liable to the aggrieved party "for all damages by him sustained by such default", and, in addition, the courts or justice of the peace was to have power by attachment "to bring such contemptuous witness into Court, or before him and to fine him at discretion not exceeding the sum of six pounds, and shall order him to pay the cost of such attachment." The Laws and Resolves of Massachusetts, 1784-1785, p. 86.

F. *Refusal to Assist Court Officers*

Massachusetts Bay: First Charter

1. A 1646 statute provided that if any person "wilfully, obstinately or contemptuously" refused or neglected "to assist any Constable", he shall pay to the use of the county forty shillings. The Laws and Liberties of Massachusetts (1648), p. 13; repeated in substance in The Book of General Laws and Libertyes (1660), p. 140, and The General Laws and Liberties of the Massachusetts Colony (1672), p. 31.

New Plymouth Colony

1. The 1672 code, in Chapter VII, under Constables directions, provided that if any person, upon request, refused to assist any constable or marshal in the execution of his office, he was to be fined 10 shillings; and if it appeared by good testimony that any person willfully, obstinately and contemptuously refused or neglected to assist any constable, he was to be fined 40 shillings. Compact, Charter and Laws, New Plymouth, 266.

Commonwealth of Massachusetts

1. A statute passed on June 21, 1784, provided for fines not exceeding twenty pounds for failure of constables to assemble the inhabitants of their towns upon receipt of warrants so to do, or for failure "to summon the persons chosen [as grand jurors] in pursuance thereof", or for failure to "make due return of the same"; and failure of any town to choose grand jurors as directed in the warrants should result in the town being amerced "as the Court shall order, not exceeding the sum of forty pounds." Laws and Resolves of Massachusetts, 1784-1785, p. 10.

2. A statute passed on June 26, 1784, provided for fines not exceeding ten pounds for similar failures of duty on the part of constables in relation to petit jurors; and for fines not exceeding five pounds for failure on the part of selectmen or town clerks to attend the assembly of towns and perform their duties in relation to the selection of petit jurors. Id., 1784-1785, p. 15.

G. *Refusal to Serve as Court Officers*
New Plymouth Colony

1. A 1660 law provided that, in lieu of the former amercement, any person chosen by any town to serve as constable and refusing to serve was to be fined 4 pounds, one-half to the town and one-half to the colony. Records of the Colony of New Plymouth of New England, *supra*, Vol. 11 (Laws, 1623-1682), pp. 165-166. This provision was incorporated in the 1672 code. Compact, Charter and Laws, New Plymouth, 264.

H. *Failure to Perform Official Duties*
Massachusetts Bay; Second Charter Period

1. A June 26, 1699 law provided that constables who failed to summon jurors and make return of their warrants to the clerk should be fined at the discretion of the justices of the courts but not to be less than forty shillings or more than five pounds. Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, Vol. 1 (1869 ed.), p. 370.

2. By statute of November 1, 1775, constables failing to obey warrants for the return of jurors for service in admiralty courts, which were established at three sites in Massachusetts, were to be fined not to exceed forty shillings. Id., Vol. 5, p. 436.

I. *Failure to Comply with Process*
Massachusetts Bay; First Charter

1. The Book of General Laws and Libertyes of 1660, pp. 167, 168, provided that "if any person Prefered by the Grand-jury for any offence, or Summoned by a Magistrate to answer any Crime, do not upon summons appear at the time appointed, upon the third call as aforesaid, he or shee shall be proceeded against for contempt, except he or shee be restrained or prevented by the hand of God." Repeated in substance in The General Laws and Liberties of the Massachusetts Colony (1672), p. 88.

New Plymouth Colony

1. The 1672 code in Chapter IV, Actions, enacted that if any person summoned to answer any presentment, or for any fact or misdemeanor, did not appear

at the time appointed, he was to be proceeded against for contempt, unless he was prevented by the hand of God. Compact, Charter and Laws, New Plymouth, 253.

2. The 1672 code provided that if a person against whom a judgment of house or lands was given, upon the trial of title or otherwise, forcibly detained possession against an officer impowered to serve execution thereon or, after execution served, entered upon the property again and retained possession by force, such person was to be accounted a high offender against the law and a breaker of the public peace; in addition to proceeding for the issuance of a warrant to the marshal, etc., to suppress the force and give possession to the owner, the offender was to be brought before the court which gave judgment to make answer; if found guilty of such forcible detainer, the court was to set such fine or other punishment as the merits of the case required. Compact, Charter and Laws New Plymouth, pp. 248-49.

Massachusetts Bay; Second Charter

1. A law enacted on June 18, 1697, authorized the justices of the peace to try petty civil matters not exceeding forty shillings, to summon the defendant to answer civil complaints, and, for non-appearance by the defendant, to issue a warrant of contempt directed to the sheriff or other officer "to bring the contemner before him, as well to answer the said contempt as the plaintiff's action, and may (if he see cause) fine such contemner not exceeding ten shillings." The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, Vol. I (1869 ed.), p. 282.

Commonwealth of Massachusetts

1. By statute of March 16, 1785, the courts were empowered to punish as contempt any disobedience to a writ of habeas corpus, and could "compel obedience thereto, by process of attachment." Laws and Resolves of Massachusetts, 1784-1785, p. 178.

J. *Refusal to Produce Documents or Answer Interrogatories*
Commonwealth of Massachusetts

1. A statute of March 11, 1784, gave jurisdiction to justices of the peace in civil matters not exceeding four pounds in value (where the title to real estate was not in question) and provided, *inter alia,* that if anyone refused to produce before a justice of the peace the record of an unsatisfied judgment rendered by a prior justice of the peace who had since died, or who refused to be examined before a justice of the peace regarding such judgment, "the Justice may punish the contempt by imprisonment until he shall produce the same, or until he submits to be examined as aforesaid." The Laws and Resolves of Massachusetts, 1782-83, p. 605.

III. Contempt Cases Arising Under Colony and State Acts

A. *Defamation or Abuse of Court or Court Officials*
Massachusetts Bay: First Charter

1. For having threatened, reproached and slandered the courts, magistrates and government, and for having "defamed the towne and church of Lin" and having "affronted and reproached" a constable in the execution of his office; fined 50 pounds, and contemnor ordered to acknowledge his offense to the court on pain of

another 200 pound fine. Records of the Governor and Company of the Massachusetts Bay in New England, Vol. 3, 1644-1657, p. 227. (General Court).

2. For having used "some reproachful speeches concerninge the Generall Court"; ordered to make public acknowledgment and "severely reproved in open Court". Id., Vol. 3, p. 390.

3. For "reproachinge of or honord magistrates, and speaking agaynst the law made and published agaynst Quakers"; fined 20 pounds, banished and committed until acknowledgment. Id., Vol. 3, p. 417 (General Court).

4. On petition for remission of fine of 30 shillings which had been imposed for affronting authority and for threatening speeches; petition denied. But, for charging some commissioners with arbitrary power and having misreported them to the General Court; petitioner fined 5 pounds and ordered to acknowledge offense. Id., Vol. 4, Part 1, 1650-1660, p. 98.

5. For "contemptuous and false speech in the Generall Court"; set in stocks for 1 hour, but on acknowledgment, remitted to fine of 20 shillings. Id., Vol. 4, Part 1, p. 376 (General Court).

6. For failure by ten Quakers "to give any civil respect" in court; penalties ranging from admonition to 30 stripes and banishment imposed. Id., Vol. 4, Part 1, p. 410 (General Court).

7. For "contempt in Court" by two Quakers; offenders "tyed to the carts tayle by the executioner, and whipt through Boston with twenty stripes a peece", then banished (with others). Id., Vol. 4, Part 2, 1661-1674, p. 24 (General Court).

8. For having made "groundless and unjust" complaints in a petition to the General Court which tended "not only to dishonor of God, but to the scandall and reproach of severall of our Courts, honored majestrates, and officers of Court"; fined 50 pounds, bound in another 100 pounds, disbarred and committed until paid. Id., Vol. 4, Part 2, p. 291.

9. For having presented "a paper of scurrilous veices" in which a magistrate and his office were defamed; contemnor whipped 20 stripes, with public lecture and declarations of his offence. Id., Vol. 5, p. 153 (General Court).

10. For having made in his petition "great reflection and high groundless charges" against the County Court of Suffolk and the clerk thereof; offender ordered to acknowledge fault, or be fined 20 pounds. Id., Vol. 5, p. 330 (General Court).

11. For attorney's unseemly reflections on court in appellate papers; fined 50 pounds, disbarred, and bound in one hundred pounds for good behavior during court's pleasure. Later the punishment was reduced to a 10 pound fine upon acknowledgment and petition. Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 3 (1642-1673), p. 195 (1666).

12. For attorney's "many high misdemeanors i.e. endeavouring to disturb his majesties Government here setled, revileing the Courts of justice and the magistrates in base and unworthy terms and making quarrels and contentions among the People, in a very perfidious manner, with profane Swearing and curseing"; fined 20 pounds, committed until paid, disbarred and banished. Id., Vol. 3, p. 217 (1672).

13. For "reflections declared in his Reasons of Appeale against one of the magistrates and County Court at Ipswich"; fined 10 pounds, remitted to 40 shillings on petition and acknowledgment. Id., Vol. 1 (1673-1692), p. 29 (1674).

14. For "reflections declared in his reasons of Appeale"; appellant admonished. Id., Vol. 1, p. 31 (1674).

15. For "Contemptuous Carriage Confronting the sentenc of this Court"; committed to stand in pillory with ear nailed thereto for one hour, then to have ear cut off and fined twenty shillings or whipped ten stripes. But, upon petition, nailing and cutting off of ear remitted. Id., Vol. 1, p. 57 (1675).

16. Upon jury trial for abusive reflections upon an assistant both in open County Court and in reasons of appeal; jury found defendant guilty and court fined him 5 pounds and ordered him to acknowledge his fault to the satisfaction of the court or else to pay a fine of 20 pounds, to stand committed until fine paid. Such acknowledgment was made. Id., Vol. 1, p. 88 (1677).

17. For "reflections" by commissioner on the honor of a County Court in prosecuting an appeal; fined 100 pounds committed until paid, and discharged as commissioner. Upon petition the fine was abated to twenty pounds and the discharge from office remitted. Id., Vol. 1, p. 103 (1677).

18. For "abusive Carriage" in cursing a court order designed to prevent the spread of small pox; offender waived trial by jury and was later sentenced to be whipped twenty stripes or to pay a fine of twenty marks, and to stand committed until the sentence was performed. Id., Vol. 1, p. 104 (1677).

19. For stating in court that he would not make answer to a summons in a civil suit as there was no Govérnor and Company and adding thereunto severall reviling words; information filed and then jury demanded and offender indicted for seditious words and expressions, but record does not reflect any further proceedings after legality of indictement objected to. Id., Vol. 1, pp. 297, 298, 299, 301 (1686).

20. For slandering a magistrate in the discharge of his duties; fined 5 pounds and ordered to pay court fees. On appeal from County Court, judgment affirmed by jury, with further court costs assessed. Id., Vol. 3, p. 363 (1691/2).

New Plymouth Colony

1. For defaming the governor and an assistant regarding a sentence passed in court and for abusive words and carriage concerning that matter; fined 20 pounds current silver money of New England. New Plymouth Colony Records, Vol. 6, p. 41 (General Court, 1680).

B. *Failure of Jurors to Attend Court*
New Plymouth Colony

1. For non-appearance to serve on grand inquest; fined twenty shillings but remitted New Plymouth Colony Records, Vol. 2, p. 76, August 1644 (all entries in this paragraph relate to the General Court); for refusing to serve on grand inquest; fined twenty shillings (id., Vol. 2, p. 171, June 1651); for non-appearance as grand jurors; each fined twenty shillings (id., Vol. 2, p. 172, Oct. 1651); for non-appearance on grand inquest; fined according to order (id., Vol. 3, p. 11, June

1652); for refusing to serve on grand inquest; fined twenty shillings (id., Vol. 3, p. 101, June 1656); for refusing to serve on the grand inquest; fined ten shillings (id., Vol. 3, p. 168, June 1659); for refusing to serve on the grand inquest; fined twenty shillings (id., Vol. 3, p. 223, March 1656/7).

Massachusetts Bay: Second Charter

1. For non-appearance of two jurors, fined 20 shillings each (Ms. Superior Court of Judicature, etc. Judgment Book, 1686-1700, p. 65); for non-appearance of petit juror, fined 20 shillings (id., p. 284). This volume and the other manuscript court records referred to below are located at Office of the Clerk, Supreme Judicial Court of Massachusetts, Suffolk County, Boston, Mass.)

2. For non-attendance by two petit jurors; fined 40 shillings each (Ms. Superior Court of Judicature Judgment Book, 1700-1714, p. 70); for non-attendance by two jurors; fined 10 shillings each (id., pp. 108, 118); for non-attendance by two petit jurors; fined 20 shillings each (id., p. 196); for non-attendance of grand juror; fined 20 shillings (id., p. 210); for non-appearance of juror; fined 40 shillings (id., p. 214); for non-attendance of two jurors; fined 10 shillings each (id., p. 229); for non-appearance of two grand jurors; fined 40 shillings each, one remitted (id., p. 229); for non-appearance of petit juror; fined 40 shillings (id., p. 264); for non-appearance of a grand and petit juror; fined 40 shillings each (id., p. 278); for non-appearance of two petit jurors; fined 40 shillings (id., p. 292).

3. For non-attendance of juror; fined 5 shillings, but

remitted on submission (Ms. Superior Court of Judicature Judgment Book, 1715-1721, p. 49); for non-attendance of petit juror; fined 10 shillings (id., p. 297); for non-attendance of three petit jurors; fined 5 shillings each (id., p. 320).

4. For non-attendance of two petit jurors; fined 5 shillings each but remitted "upon their Excuse and submission" (Ms. Superior Court of Judicature Judgment Book, 1721-1725, p. 34); for non-attendance of two jurors; fined 5 shillings each (id., p. 51); for non-appearance of five petit jurors; fined 4 pounds each (id., p. 93); for non-appearance of three petit jurors; fined 5 pounds, 4 pounds (remitted) and 5 shillings, respectively (id., p. 165); for non-appearance of two petit jurors; fined 4 pounds each (one remitted) (id., p. 189); for non-appearance of juror; fined 5 pounds (id., p. 245).

5. For non-attendance of petit juror; fined 5 pounds (Ms. Superior Court of Judicature Judgment Book, 1725-1729, p. 184); for non-attendance as grand juror; fined 4 pounds (later remitted) (Ibid.); for non-attendance of petit juror; fined 5 pounds (id., p. 317).

6. For non-appearance of three jurors; fined 4 pounds each (Ms. Superior Court of Judicature Judgment Book, 1725-1730, p. 63); for non-appearance of two petit jurors; one fined 5 pounds, the other excused (id., p. 87); for non-attendance of five petit jurors; fines of 4 or 6 pounds imposed (one remitted) (id., p. 367).

7. For non-appearance of petit juror; fined 5 pounds (Ms. Superior Court of Judicature Judgment Book, 1730-1733, p. 52); for non-appearance of grand juror; fined 4 pounds (id., p. 273); for non-appearance of two

petit jurors; fined 5 pounds each (id., p. 273); for non-attendance of four petit jurors; fined 4 pounds each (Ms. Superior Court of Judicature Judgment Book, 1739-1740, p. 45); for non-attendance of six petit jurors; fined from 4 to 6 pounds each (id., p. 107); for non-attendance of ten petit jurors; fined 5 or 6 pounds each (id., p. 205).

8. For non-attendance of two petit jurors; fined 4 pounds each (Ms. Superior Court of Judicature Judgment Book, 1740-1742, p. 76); for non-attendance of eight petit jurors; fined 4 to 6 pounds each (id., p. 137); for non-attendance of two petit jurors; fined 6 pounds each (id., p. 202).

9. For non-attendance of four jurors; fined 4 or 6 pounds each (Ms. Superior Court of Judicature Judgment Book, 1740-1745, p. 87); for non-appearance of ten petit jurors; fined from 20 to 40 shillings each (id., p. 267).

10. For non-appearance of eight petit jurors; fined 20 or 40 shillings each (Ms. Superior Court of Judicature Judgment Book, 1743-1747, p. 33); for non-attendance of eighteen petit jurors; fined from 20 to 40 shillings each (id., p. 77); for non-attendance of nine petit jurors; fined 40 shillings each (id., p. 161); for non-attendance of four petit jurors; fined 20 shillings each (id., p. 180); for non-attendance of thirteen petit jurors; fined 40 shillings each (id., p. 206); for non-attendance of ten petit jurors; fined 30 or 40 shillings each (id., p. 289); for non-attendance of petit juror; fined 30 shillings (id., p. 311).

11. For non-attendance of twenty-two petit jurors; fined 30 or 40 shillings each (one later remitted) (Ms.

Superior Court of Judicature Judgment Book, 1747-1750, p. 39); for non-attendance of seventeen jurors; fined 30 or 40 shilings each (id., p. 88); for non-attendance of thirty-five petit jurors; fined 30 or 40 shillings each (id., p. 159); for non-attendance of thirty-four petit jurors; fined 30 or 40 shillings each (id., p. 226).

12. For non-attendance of nine petit jurors; eight fined 21s., 4d. each, the other fined 8 pounds (Ms. Superior Court of Judicature Judgment Book, 1753-1754, p. 47); for four jurors being "delinquent"; fined 21s., 4d. each (id., p. 185); for non-attendance of six petit jurors; fined 21s., 4d. each (id., p. 185); for non-attendance of six petit jurors; five fined 21s., 4d. each, the other fined 3 pounds (id., p. 348).

13. For two jurors being "delinquent"; fined 21s., 4d. each (Ms. Superior Court of Judicature Judgment Book, 1757-1759, p. 693).

14. For two jurors being "delinquent"; fined 21s., 4d. each (Ms. Superior Court of Judicature Judgment Book, 1760-1762, p. 30); for non-attendance of two petit jurors; fined 20 shillings each (id., p. 92).

15. For non-attendance of three petit jurors; fined 20 shillings each (later remitted) (Ms. Superior Court of Judicature Judgment Book, 1766-1767, p. 32); for non-attendance of four petit jurors; three fined 30 shillings each, the other fined 5 pounds (id., p. 111); for non-attendance of petit juror; fined 30 shillings (id., p. 226); for non-attendance of three petit jurors, fined 30 shillings each (id., p. 231).

16. For non-attendance of petit juror; fined 6 pounds (Ms. Superior Court of Judicature Judgment Book, 1773-1774, p. 119).

17. For non-attendance of ten jurors; fined 4 pounds and 10 shillings each (Ms. Superior Court of Judicature Judgment Book, 1778-1780, p. 50); for non-attendance of two petit jurors; fined 4 pounds and 10 shillings or 6 pounds each (id., p. 88); for non-attendance of grand juror; fined 32 pounds (id., p. 101); for non-attendance of four petit jurors; three fined 4 pounds and 10 shillings each, the fourth fined 12 pounds (id., p. 120); for non-attendance of petit juror; fined 48 pounds (id., p. 191).

Commonwealth of Massachusetts

1. For non-attendance of petit juror; fined thirty shillings (Ms. Supreme Judicial Court Judgment Book, 1781-1782, p. 55); for non-appearance of petit juror; fined 30 shillings (id., p. 158); for "missing" petit juror; fined 10 pounds (id., p. 358).

2. For non-attendance of petit juror; fined 3 pounds, 12 shillings (Ms. Supreme Judicial Court Judgment Book, 1783, p. 180); for non-attendance of juror; fined 30 shillings (id., p. 286).

3. For non-attendance of petit juror; fined 6 pounds (Ms. Supreme Judicial Court Judgment Book, 1784, p. 41); for non-attendance of petit juror; fined 30 shillings (id., p. 227); for non-attendance of four delinquent jurors; fined 3 pounds or 40 shillings (id., p. 227); for non-attendance of juror; fined 30 shillings (id., p. 372); for non-attendance of two petit jurors; fined 30 shillings each (id., p. 372).

4. For non-appearance of petit juror; fined 5 pounds (Ms. Supreme Judicial Court Judgment Book, June to Nov. 1785, p. 322); for non-attendance of petit juror;

fined 40 shillings (Ms. Supreme Judicial Court Judgment Book, 1787, p. 122).

5. For "contempt" in not attending jury service; on excuse, discharged, paying costs (Ms. Supreme Judicial Court Judgment Book, 1790, 118); for non-attendance of petit jurors; fined 40 shillings, later remitted (id., p. 79); for non-attendance of petit juror; fined 40 shillings (id., p. 231).

6. For non-attendance of two petit jurors; fined 40 shillings and 5 pounds (Ms. Supreme Judicial Court Judgment Book, 1792, p. 28).

7. For non-attendance of three petit jurors; fined 40 shillings or 5 pounds (Ms. Supreme Judicial Court Judgment Book, 1793, p. 46); for non-attendance of two petit jurors; fined 40 shillings and 5 pounds, respectively (id., p. 220); for non-attendance of petit juror; fined 40 shillings (id., p. 302).

8. For non-attendance of five petit jurors; fined 40 shillings or 5 pounds (one fine not stated) (Ms. Supreme Judicial Court Judgment Book, 1794, pp. 33, 122); for non-attendance of three grand jurors; cited for contempt, two excused and one failed to appear (id., p. 184).

9. For non-service of three jurors, each fined 5 pounds (Ms. Supreme Judicial Court Judgment Book, 1795, p. 31); for non-attendance of petit juror; fined 10 shillings (id., p. 191); for non-attendance of two petit jurors; fined 40 shillings each (id., p. 219).

10. For non-attendance of six petit jurors; fined $16.667 each (Ms. Supreme Judicial Court Judgment Book, 1796, p. 224); for non-attendance of petit juror; sentenced to the "usual fine" (id., p. 324).

11. For non-attendance of four petit jurors; sentenced to "the usual fine" (Ms. Supreme Judicial Court Judgment Book, 1797, p. 34); for non-attendance of two petit jurors; fined (amount not stated) (id., p. 240).

12. For non-service of three petit jurors; fined 5 pounds each (Ms. Supreme Judicial Court Judgment Book, Feb. 1798 to Aug. 1799, p. 45); for non-service of grand juror; fined (no amount stated) (id., p. 90); for non-attendance of petit juror; fined (no amount stated) (id., p. 176); for non-service of three petit jurors; fined 40 shillings or 5 pounds (id., p. 241).

C. *Failure of Witnesses to Appear or Testify*

Commonwealth of Massachusetts

1. For contempt in not answering summons to testify; committed to custody of sheriff, paying costs (Ms. Supreme Judicial Court Judgment Book, May-Nov. 1789, p. 252.)

2. For two contempts in failing to answer summons to testify; on excuse, discharged. Id., 1790, p. 64.

3. Attachment for contempt issued for non-appearance of witness. Id., 1790, p. 106.

4. Warrant for contempt issued for non-appearance of witness. Id., 1790, p. 226.

5. For contempt in not answering a summons to testify; excused on appearing. Id., 1795, p. 31.

6. For contempt in failing to appear to testify; excused on appearance, paying costs. Id., 1796, p. 344.

7. For contempt in failing to answer summons to testify; excused, paying costs. Id., 1797, p. 60.

8. For contempt upon two failures to appear to testify; excused, paying costs. Id., 1797, p. 144.

D. *Failure to Assist Court Officers*
New Plymouth Colony

1. For refusing to assist marshal in execution of his office; three persons fined 10 shillings apiece. New Plymouth Colony Records, Vol. 6, p. 41, June 1680 (General Court).

2. For wilfully, obstinately and contemptuously refusing to assist the marshal in the execution of his office; fined 40 shillings. Id., Vol. 6, p. 41, June 1680 (General Court).

3. For refusing to aid a constable; two persons fined 10 shillings apiece, but fine reduced to 5 shillings if paid "willingly." Id., Vol. 6, p. 56, March 1680/1 (Court of Assistants).

E. *Refusal to Serve as Court Officers*
New Plymouth Colony

1. For refusing to serve as constable; fined 50 shillings. New Plymouth Colony Records, Vol. 3, p. 191, June 1660 (General Court).

2. For refusing to serve as constable; fined 4 pounds. Id., Vol. 5, p. 100, July 1672 (General Court).

3. For refusing to serve as constable; two persons fined. Id., Vol. 5, p. 149, July 1674 (General Court).

4. For refusing to serve as constable; three persons fined. Id., Vol. 5, pp. 153, 225, Oct. 1674 (Court of Assistants).

F. *Failure to Perform Official Duties*
Massachusetts Bay: Second Charter

1. For failure of constable to return the warrant for choice of jury; fined forty shillings. Ms. Superior Court of Judicature Judgment Book, 1700-1714, p. 66.

2. For constable's failure to return warrant for choice of jurymen, fined forty shillings. Id., 1700-1714, p. 147.

3. For constable's failure to return the venire for choice of jurors; fined forty shillings. Id., 1725-1730, p. 38.

IV. Extension of Laws of England to Colony or State

Massachusetts Bay: Second Charter Period

1. By act of June 26, 1699, a Superior Court of Judicature, Court of Assize and General Gaol Delivery were established with jurisdiction "of all pleas, real, personal or mixt", all pleas of the crown, all matters relating to the conservation of the peace and "generally of all other matters, as fully and amply to all intents and purposes whatsoever as the courts of king's bench, common pleas and exchequer within his majesty's kingdom of England have or ought to have." Acts and Resolves, Public and Private, of the Province of the Massachusetts-Bay, Vol. 1, p. 370.

Commonwealth of Massachusetts

1. Chapter VI, Article VI of the Constitution of the Commonwealth of Massachusetts, Part the Second, adopted in 1780 provided that:

> "All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." Thorpe, Federal and State Constitutions, Colonial Charters and Other Organic Laws, Vol. 3, pp. 1888, 1910 (1909).

2. By statute of February 20, 1781, the Supreme Judicial Court was authorized to take cognizance of all matters which were cognizable "by the late Superior Court of Judicature, Court of Assize and General Gaol Delivery." The Laws and Resolves of Massachusetts, 1780-81, p. 32.

3. An early opinion, probably by Parsons, C. J. in *Commonwealth* v. *Knowlton,* 3 Mass. 534 (1807) stated:

> "Our ancestors, when they came into this new world, claimed the common law as their birth-right, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was *amended* or *altered* by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some *few other English statutes,* passed since the emigration, were adopted by our courts, and now have the authority of law, derived from long practice . . . .
>
> "So much therefore of the common law of England as our ancestors brought with them, and of the statutes then in force, *amending* or *altering* it; such of the more recent statutes as have been since adopted in practice; and the ancient usages [deriving from annulled laws of the Massachusetts Bay Colony] . . . may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution."

4. In *Going* v. *Emery,* 33 Mass. (16 Pick.) 107 (1834) Chief Justice Shaw of the Supreme Judicial Court stated in part:

"As a general rule, it must be considered that our ancestors came here as British subjects, submitting to the obligations and claiming the protection and privileges of the laws of England, as they then stood. All the statutes of the realm, previously made, especially those altering, modifying, or declaring the common law, were included with and adopted as a part of that code. Those statutes of a general and beneficial nature, such as the statute of uses, of wills, and the like, of which many were passed in the reigns of Henry 8, Elizabeth and James 1, were as useful in their nature and as beneficial to the subject, as the body of the common law. By an act passed soon after the granting of the provincial charter, 4 Wm. & Mary, Anc. Chart. 213, 229, it was provided, that all the laws and ordinances in force under the then late colonial government, should remain in force until altered or repealed by the provincial legislature thereby established. And by the constitution of the Commonwealth, c. 6, § 6, it is declared, that all the laws which have heretofore been adopted, used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature. It is by this course of regular transmission, that the common law of England, and the statutes in force at the time of the settlement of this country, have been established and have the force of law at the present time."

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempts*

Massachusetts Bay: First Charter

1. For causing his daughter to deliver a paper to a juror out of court, fined 10 shillings. Records of the Col-

ony of the Massachusetts-Bay in New England, Vol. 1 (ed. N.B. Shurtleff, 1853), p. 246 (Quarter Court, 1638).

2. For pleading a cause to a jury outside of the court; attorney disbarred from practice. Id., Vol. 1, p. 270 (Quarter Court, 1639).

3. On petition for remission of fine imposed by the County Court at Boston for petitioner's "unworthy carriage and resistance of the counstable"; petition denied. Id., Vol. 4, Part 1 (1650-1660), p. 52 (General Court).

4. For contempt (unspecified); bonded for good behavior and imprisoned until bond posted. Records of the Court of Assistants of the Colony of Massachusetts-Bay, Vol. 2 (1630-1644), p. 56 (1635).

5. For contempt (unspecified); fined 50 pounds and sent to prison until gave satisfaction. Id., Vol. 2, p. 66 (1637).

6. For contempt (unspecified); fined 15s., 8d. Id., Vol. 2, p. 75 (1638).

7. For contempt (unspecified); fined 5 pounds. Id, Vol. 2, p. 78 (1638).

8. For an attorney pleading a cause to a jury outside of the court; attorney Thomas Lechford "debarred from pleading any mans cause hereafter unless his owne." Id., Vol. 2, p. 87. The punishment was apparently "dismissed" later when the offender apologized for his conduct. Id., p. 99 (1639-1640).

9. For "discountenancing a witnesse"; committed until bound in 20 pounds bond. Records of the Court of Assistants, 1641-1644, reprinted in the Colonial Laws of Massachusetts, 1672 (ed. Whitmore, 1890), p. xxxiii.

10. For "endeavoring to obstruct the free course of Justice" by abetting crimes and assisting criminals to escape; for this and underlying substantive crimes, fined 500 pounds and committed until paid. Records of the Court of Assistants of the Colony of Massachusetts-Bay, Vol. 1, 1673-1692, p. 13 (1673).

11. For two prisoners (imprisoned on substantive charges) reiterating "Oaths and Cursings" and threatening to burn the town if loose; whipped 20 stripes each and returned to prison. Id., Vol. 1, p. 189 (1680).

New Plymouth Colony

1. For "contempt"; set in the stocks. New Plymouth Colony Records, Vol. 1, p. 44 (General Court, 1636).

2. For rescuing a Quaker from the marshal and for breaking away when taken prisoner; sentenced to be publicly whipped. Id., Vol. 3, p. 191 (General Court, 1660).

Massachusetts Bay: Second Charter

1. For speaking to petit jury after case had been committed to it; fined 5 pounds and ordered to pay costs. Ms. Superior Court of Judicature Judgment Book, 1700-1714, p. 144.

2. For town's refusal to choose jurors "in Manifest Contempt of Her Majestys Authority"; town fined 3 pounds. Id., 1700-1714, p. 147.

3. For malicious defacing and posting a warrant "in great Contempt of Authority"; defendant put on public display, with explanatory material attached to him, and afterwards discharged. Ms. Superior Court of Judicature Judgment Book, 1715-1721, p. 338.

4. A grand jury charge delivered by Chief Justice Thomas Hutchinson c. 1761-1762, reported in Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772, pp. 241-246, contained the following as to the Superior Court's power to punish for contempt (at pp. 244-46):

> "The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more that a Freedom for every Thing to pass from the Press without a Licence.—That is, you shall not be obliged to obtain a Licence from any Authority before the Emission of Things from the Press. Unlicenced Printing was never thought to mean a Liberty of reviling and calumniating all Ranks and Degrees of Men with Impunity, all Authority with Ignominy.—To carry this absurd Notion of the Liberty of the Press to the Length some would have it—to print every Thing that is Libellous and Slanderous—is truly astonishing, and of the most dangerous Tendency.
>
> "To publish that a Man was a Bankrupt, a Villain or the like, would assuredly be liable to a civil Action, if not an Indictment.—To strike a Man in the King's Court will subject the Offender to the Loss of his Hand and Imprisonment for Life.—And yet, shall that same Court tolerate the grossest Abuse in the publick Prints, and let all Insults pass with Impunity?—Shall a Man be allowed to publish openly of an Executive Court, in Print, what he dares not charge a private Man with, in Conversation?
>
> "I don't give the Abuse in this Matter in Charge to you, Gentlemen, because I conceive that this Court have full Power to proceed in a much more

Summary Way to execute Justice on the Offenders.

"We often hear of very severe Strictures made upon the Conduct of Ministers of State in Great Britain; but we never hear of similar Reflections upon the Judges of Westminster Hall.—They would issue a Process for Contempt of the Court, and commit the Printer instantly, if he did not expose the Authors—and, if he did. very like, both Author and Publisher.

" 'Tis on the Dignity and Support of the Executive Courts that your own Liberty depends. Let the Respect due to these Courts be lost, let their Dignity not be kept up, by a Support of Authority, and all Order and Government will soon be at End. For what Order can there be in a Society where the Courts which are to carry the Laws into Execution are treated with a contemptuous Disrespect?—If such an unlimited Liberty is indulged and carried on, we shall soon approach near to that Licentiousness which is worse than Tyranny.

"I would mention, in Order to show People the Hazard they run, in treating this Court abusively, and to caution all against a like Conduct for the Future, that we are not obliged to have the Matter presented in the first Place by the Grand Jury, then to have it left to a Petit Jury to be decided, before the Offence can be punished; but this Court may proceed in a far more summary Manner, to bring the Offender to Justice.—This Court will ever take proper Care to secure their Honour by keeping up their Authority."

5. For "insolent and Rebellious Carriages in opposing and resisting" a warrant to take persons into custody; offenders ordered seized. Ms. Records of the Governor and Council, 1692, p. 304 (Governor and Council).

6. For having written a paper "containing false, malicious and slanderous reflections upon his Excelley and Council" and, when called to account, having justified the same and "behaved himself contemptuously towards his Majtys authority and Government"; committed (no term specified), discharged on petition one day later. Id., 1699, pp. 100-101.

7. For judge of probate having disobeyed an order from the Governor and Council, and for "unmannerly and rude behavior" towards the Governor and the Board; Council advised the Governor to suspend offender from office. Id., 1710, p. 243.

8. For having misbehaved greatly towards the Governor and the Council Board; voted that the Governor "shew his just displeasure". Id., 1746, p. 650.

9. For having insulted a member of the Council; acknowledgment accepted. Id., 1763, p. 256.

10. For having treated "his Excellency's Proclamation with indecency"; a justice of the peace was admonished. Id., 1764, p. 317.

Commonwealth of Massachusetts

1. Upon indictment for seditious statements about justice, judges and the courts; after pleading guilty, fined 50 pounds, committed for six months, assessed costs, and placed on good behavior for five years on 200 pounds bond. Ms. Supreme Judicial Court Judgment Book, 1781-1782, p. 179.

2. Upon indictment for criticism of the Court, both in presence of and outside the court; after pleading guilty, fined 3 pounds, placed on good behavior for two years on bond of 80 pounds, and to pay costs. Id., 1781-1782, p. 291.

3. Upon indictment for sedition, including statements damaging legislative and judicial officers; after pleading guilty, fined 8 pounds, bonded in 150 pounds for two years good behavior, and to pay costs. Id., 1781-1782, p. 325.

4. Upon indictment for assorted words, including damning of officer serving warrant; after being found guilty by jury, sentenced to confinement for one year, and to pay costs. Id., 1781-1782, p. 326.

5. Upon indictment for sedition, including statements concerning judges; after pleading guilty, fined 40 pounds and costs. Id., 1783, p. 85.

6. For contempt (not specified); committed (no stated term), then released on confession and petition. Id., 1784, p. 41.

7. On indictment of deputy sheriff for unlawfully speaking to a jury; on plea of guilty, fined four pounds, and costs. Id., 1784, p. 265.

8. On indictment for sedition, interfering with the administration of justice and preventing justices from holding court; some entered guilty pleas and others found guilty by jury. Fined from 40 shillings to 5 pounds, with various bonds for good behavior. Id., June to Nov. 1785, p. 322.

9. Upon indictments for various seditious acts, including interference with the due administration of justice and preventing the sitting of the courts; two defendants found guilty by jury, one fined 40 pounds and the other one suspended. Id., Feb.-June 1786, pp. 204, 205.

10. On indictment for treason, including the assault of justices (of lower court) and preventing court from

siting; found guilty by jury and sentenced to death. Id., 1787, p.65.

11. On series of indictments for treason and sedition, including interfering with the sitting of the courts and the due administration of justice; on pleas of guilty and jury verdicts of guilty, defendants sentenced from fine of 20 pounds, or one hour in the pillory and 20 lashes, to death. Id., 1787, pp. 76-81.

12. For contempt (not specified); committed until further order. After asking pardon of the court, defendant discharged with admonition. Id., 1792, p. 227.

13. Indictment for contempt (not specified), after a not guilty plea, case nolle prossed. Id., 1793, p. 159.

14. For "contempt in the face of the Court"; committed until further order, later discharged upon confession and promise to reform. Id., 1795, p. 344.

15. For petit juror separating from his fellow jurors "before they had agreed upon a verdict"; fined $10.00 and costs. Id., 1797, p. 60.

B. *Defamation or Abuse of Court or Court Officials*
Massachusetts Bay: First Charter

1. For scandalous and malicious speech against the General Court, sentenced to be whipped. Records of the Colony of the Massachusetts Bay in New England, Vol. 1, (ed. N. B. Shurtleff, 1853), pp. 77-81, 84 (1630).

2. For writing to England "falsely and mallitiously against the government and execution of justice here"; ordered whipped and banished from the plantation. Id., Vol. 1, p. 91 (General Court, 1631).

3. For disrespectful speech to the General Court; ordered set in the bilboes. Id., p. 94 (1632).

4. For upbraiding the General Court with injustice; fined 20 pounds. Id., Vol. 1, p. 132 (1634).

5. For affirming that the assistants were no magistrates; ordered "disenabled" from holding public office in the colony for three years. Id., Vol. 1, p. 136 (General Court, 1634-1635).

6. For "slighting" the magistrates; fined 5 pounds and ordered to have 20 stripes sharply inflicted. Id., Vol. 1, p. 177 (General Court, 1636),

7. For "contempt" and threatening a marshal; fined 10 pounds but, upon submission, 5 pounds was remitted. Id., Vol. 1, p. 261 (General Court, 1639).

8. For imputing venality to the court by uttering malicious and scandalous speeches; whipped. Records of the Court of Assistants of the Colony of Massachusetts-Bay, 1630-1692, Vol. 2, (1630-1644), p. 12 (1630/1).

9. For "writeing into England falsely and mallitiously against the goverment and execution of Justice here"; whipped and banished. Id., Vol. 2, p. 19 (1631).

10. For threatening that if punished, he would have it tried in England; "sett in the bilbowes." Id., Vol. 2, p. 21 (1632).

11. For "misdemeanor and insolent carriage and speeches" to an Assistant at his house and in General Court; fined 5 pounds and bound to good behavior. Id., Vol. 2, p. 24 (1632).

12. For speaking "reproachful and seditious words" against the government and "findeing fault" with the acts of the court; fined 40 pounds, disfranchised and "sett in the bilbowes". Id., Vol. 2, p. 30 (1632).

13. For assaulting and slandering an Assistant, calling him "a just asse"; fined 100 pounds and banished. Id., Vol. 2, p. 35 (1633).

14. For calling an Assistant "assorted names"; whipped and fined (unspecified amount). Id., Vol. 2, p. 43 (1634).

15. For "upbraydeing the court with Injustice"; fined 20 pounds. Id., Vol. 2, p. 48 (1634).

16. For "insulting" the court and the Governor ("sayeing he was but a Lower's clerke") and for "abuseing a maid of the Governor"; fined 40 pounds and whipped. Id., Vol. 2, p. 49 (1634).

17. For contempt, apparently for having spoken disparagingly of the justice of the court; fined 50 shillings and ordered to remain in prison until he paid his fine and acknowledged the justice of the court (which was done). Id., Vol. 2, p. 62 (1636).

18. For speaking "contemtuously" of the magistrates; fined 20 pounds, committed until paid, and banished. Id., Vol. 2, p. 71 (1637).

19. For speaking against the magistrates, the churches and the Elders; whipped and committed until General Court met. Id., Vol. 2, p. 76 (1638).

20. For speaking against a magistrate; committed and released on a bond of 20 pounds. Id., Vol. 2, p. 78 (1638).

21. For speaking against a law and a magistrate; fined 10 pounds with three witnesses to have 6s., 8d. apiece. Id., Vol. 2, p. 82 (1639).

22. For "Contemptuous speach and carriage" to an Assistant; court enjoined him to acknowledge his fault in public and to be of good behavior and appear at the

next court in bond of 66 pounds, 13 shillings and 4 pence. Id., Vol. 2, p. 92 (1639/40).

23. For abusing a magistrate and another; committed, but later released on acknowledgment. Id., Vol. 2, p. 132 (1643).

24. For "Rayling and Contemptuous carriage and speeches agt the whole Court", and for insulting the governor in court; Quaker whipped twenty stripes. Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 3 (1642-1673), p. 68 (1659).

25. For slandering the Court of Ipswich in appellate papers; fined five pounds, and ordered to make acknowledgement or be fined another twenty pounds. Id., Vol. 3, p. 74 (1659/60).

26. On appeal from Commissioner's Court judgment for defaming commissioners and insulting a constable ("a pox takes your tricks"); affirmed on jury's special verdict. Id., Vol. 1, p. 200 (1681).

27. For speaking disrespectfully of a magistrate; released on bond of 20 pounds to appear at the next court and in the meantime to be of good behavior. Records of the Colony of the Massachusetts-Bay in New England, Vol. 1, 1628-1641, p. 245 (Court of Assistants).

28. For speaking against the law pertaining to hogs and for speaking disrespectfully of a particular magistrate; fined 10 pounds. Id., Vol. 1, p. 265 (Court of Assistants).

New Plymouth Colony

1. Presented for defamation against an assistant; no further entry. New Plymouth Colony Records, Vol. 2, p. 12 (General Court, 1640).

2. For contemptuous words against church and assistants; bound in sum of 40 pounds, with two sureties to appear and answer at next General Court and in meantime to be of good behavior. Id., Vol. 2, p. 17 (General Court, 1641).

3. For "unadvised" taking of oath and for insolent carriage toward magistrate; fined 30 shillings or if not paid by next court, to suffer bodily punishment. Id., Vol. 3, p. 4 (General Court, March 1651-1652).

4. For abusing constable in execution of his office; fined 3 pounds. Id., Vol. 3, p. 10 (General Court, 1652).

5. For opprobrious speech to magistrate in court; fined 10 pounds. Id., Vol. 3, p. 22 (General Court, March 1652-1653).

6. Presented for abusing a constable levying distress with words and actions and for refusing to give security according to warrant, remitted upon constable's request. Id., Vol. 3, p. 75 (General Court, 1654).

7. For speaking opprobiously to the constable's deputy; offender admonished and cleared. Id., Vol. 3, p. 124 (General Court, 1657).

8. For resisting and abusing constable in execution of his office; fined 5 pounds. Id., Vol. 3, p. 129 (General Court, 1657-1658).

9. For presenting a writing of "dangerouse consequence" to the court and others; ordered to find sureties for his good behavior. Upon submission court limited punishment to admonition. Id., Vol. 3, p. 139 (General Court, 1657-1658).

10. For presentation of seditious and slanderous writing to the court; admonished because defendant was old and infirm, but court said that the penalty would be

augmented if offender acted in like manner again. Id., Vol. 3, p. 139 (General Court, 1658).

11. For speaking reproachfully to the court and of a particular law; fined 50 shillings. Id., Vol. 3, p. 150 (General Court, 1658).

12. For using threatening speeches to a marshal; fined 20 shillings. Id., Vol. 3, p. 173 (General Court, 1659).

13. For "turbulent carriage" when their son was searched for by marshal at their home; parents fined 40 shillings. Id., Vol. 3, p. 191 (General Court, 1660).

14. For Quaker entering the colony for the second time and for behaving turbulently and insolently to the court; sentenced to be laid "neck and heels." Later, when he refused to leave the colony, the court ordered him whipped and sent out of the government. Id., Vol. 3, p. 199 (General Court, 1660).

15. For tumultous carriage against a marshal and constable; court issued summons to the constable requiring the offenders to appear in court to answer the same. Id., Vol. 3, p. 204 (General Court, 1660-1661).

16. For abusing a grand juror; warned to appear at the next court to answer. Id., Vol. 3, p. 209 (General Court, 1660-1661).

17. For turbulent carriage toward the marshal in execution of his office; fined 10 shillings. Id., Vol. 3, p. 221 (General Court, 1661).

18. For "affronting" a constable in the execution of his office and for speaking opprobriously of the Lord Protector in the presence of the court; fined 40 shillings and ordered to make a public acknowledgment of his fault. Id., Vol. 3, p. 223 (General Court, 1656-1657).

19. For "deluding" a magistrate about the publication of his son's marriage; fined 40 shillings. Id., Vol. 4, p. 5 (General Court, 1661).

20. For scandalous charges against an assistant tending to defame the King's authority in the General Court and to stir up faction and sedition; fined 50 pounds, but abated to 30 pounds upon acknowledgment of miscarriage in open court. Id., Vol. 4, p. 40 (General Court, 1666-1667).

21. For affronting the constable in the execution of his office; fined 10 shillings. Id., Vol. 4, p. 137 (General Court, 1666).

22. For affronting a constable by words and actions in the execution of his office; committed during the pleasure of the court. Id., Vol. 4, p. 9 (General Court, 1668).

23. For abusing constable by reviling and threatening him and otherwise putting him to trouble; ordered to pay the constable 20 shillings and 5 shillings apiece to two witnesses. Id., Vol. 4, p. 9 (General Court, 1668).

24. For affronting constable in the execution of his office; fined 5 shillings. Id., Vol. 5, p. 10 (General Court, 1668).

25. For speaking evil of one of the magistrates; fined 20 shilling. Id., Vol. 5, p. 27 (General Court, 1669).

26. For speaking wicked and reproachful words against the governor and magistrates; jury "cleared" offender legally, only one witness being produced against offender. Id., Vol. 5, p. 32 (General Court, 1669-1670).

27. For abusive carriage toward a constable; fined

10 shillings. Id., Vol. 5, p. 85 (General Court, 1671-1672).

28. For abusing constable by drawing knife and threatening to stab and throwing stick at him; fined 40 shillings. Id., Vol. 5, p. 169 (General Court, 1675).

29. For slander against an assistant (apparently made while sitting); after making submission to court, offender ordered to pay costs and charges, with the stipulation that if the offender renewed his slander, the assistant "hath his libertie to procecute against him as hee shall see reason." Id., Vol. 2, p. 152 (Court of Assistants, 1650).

30. For "turbulent carriages" to a constable; fined 10 shillings. Id., Vol. 6, p. 115 (Court of Assistants, 1683).

31. For violently resisting and striking a constable, for conspiring with another to resist a constable in the execution of his office, and for causing false imprisonment or arrest of constable and his company; upon indictments, jury found defendants guilty; one defendant fined 7 pounds and the other 5 pounds, together with charges of prosecution and costs, and to stand committed until sentences be performed. Id., Vol. 6, p. 180 (Court of Assistants, 1685-1686).

Massachusetts Bay: Second Charter

1. For failure to deliver two books "in Contempt of the order of the Lt. Governour and Councell"; admonished by the court, but, upon "Giving Some Contemptuous language to the Court", contemnor committed for an indeterminate period. He was later discharged on

petition, paying fees. Ms. Supreme Court of Judicature Judgment Book, 1692-1695, p. 208.

2. On appeal from judgment for constable's refusal to obey the commands of two justices of the peace and for laying hold of one of them in a "Contemptuous manner"; reversed. Id., 1725-1730, p. 41.

3. On writ of habeas corpus for imprisonment for "Contemptuous Carriage" upon examination before the justices; offender discharged from custody since the date of the examination did not appear in the mittimus. Id., 1740-1745, p. 84.

4. On appeal of presentment for contempt of authority by swearing at a justice; found guilty and fined twenty shillings and ordered to pay costs. Id., 1760-1762, p. 208.

5. On charge of affronting a juror; party ordered to appear to answer charge. Id., 1760-1762, p. 900.

6. For attorney's writing and having published in a newspaper certain "injurious and scandalous reflections" on several justices of the court; ordered that defendant's name be "struck out of the Rolls of the Barristers and attorneys" of the court and that "he do not hereafter appear or act as a Barrister or Attorney" of the court. Id., 1767-1768, p. 46.

7. On petition by justice of the peace that a particular sheriff had "offered several affronts and indignities to him", praying that evidence be taken and matter considered by the Council Board "so that justice may be done"; this was accomplished, but no further action is noted. Ms. Records of the Governor and Council, 1735, p. 251.

C. *Misconduct in Court*

Massachusetts Bay: First Charter

1. For unbecoming statement made while testifying; fined 40 shillings. Records of the Governor and Company of the Massachusetts-Bay in New England. Vol. 4, Part 1, 1650-1660, p. 10 (General Court).

2. For having failed to answer when his name was called and for having "contemptuously turned his backe on the Court"; dismissed upon explanation. Id., Vol. 4, Part 1, p. 158 (General Court).

3. For drawing a knife in court; sentenced to be severely whipped and fined 5 pounds. Id., Vol. 1, 1628-1641, p. 270 (Court of Assistants).

4. For "insolent and contemptuous carriage" (presumably in court); committed to be laid in irons and whipped. Id., Vol. 1, p. 296 (Court of Assistants).

5. For speaking disrespectfully toward a grand jury; fined 3 pounds, 6 shillings and 8 pence and bound to his good behavior. Id., Vol. 1, p. 300 (Court of Assistants).

6. For miscarriage in court; fined 40 shillings. Id., Vol. 1, p. 335 (Court of Assistants).

7. For "miscarriage in Court"; fined 40 shillings. Records of the Court of Assistants of the Colony of Massachusetts-Bay, 1630-1692, Vol. 2 (1630-1644), p. 108 (1641).

8. For departing the court without leave; fined 5 shillings each. Id., Vol. 1, p. 52 (1675).

9. For "Contemptuous Carriage in the Court" (apparently one juror dissenting from the other eleven jurors without a satisfactory reason given to the court for doing so); fined 10 pounds. Id., Vol. 1, p. 55 (1675).

10. For three members leaving the court before ad-

journment; each fined 40 shillings. Id., Vol. 1, p. 90 (1677).

11. For refusal to plead to presentment for blasphemy and assorted disturbances in court; whipped 20 stripes and committed at Council's discretion (unclear if sentence for blasphemy, contempt, or both). Id., Vol. 1, p. 201 (1681).

New Plymouth Colony

1. For "misdemeanors" in open court toward "the Bench" and stirring up people to mutiny in the face of the court; fined 20 pounds (remitted to 10) and committed for failure to put in sureties for good behavior during stay in colony, which was limited to 14 days. New Plymouth Colony Records, Vol. 1, pp. 105-106 (General Court, 1638).

2. For coming into court drunk after former censures for drunkenness; ordered to find sureties for good behavior in amount of 40 pounds. Id., Vol. 3, pp. 22-23 (1652-1658).

3. For telling a lie in court; fined ten shillings. Id., Vol. 3, p. 129 (General Court, 1657-1658).

4. For irreverent wearing of hats in court; four persons fined 20 shillings apiece. Id., Vol. 3, p. 130 (General Court, 1657-1658).

5. For entry by Quakers into the colony contrary to law and for behaving "turbulently" at several examinations before court; sentenced to be whipped and committed until payment of marshal's fees. Id., Vol. 3, pp. 139-140 (1658).

6. For "tumultuous" and seditious carriages and speeches in court; sentenced to lie "neck and heels"

during the pleasure of the court. Sentence suspended because of offender's age and infirmities, but court admonished him that if he did not carry himself better in court for the future that the court would take a course to rid him out of the colony. Id., Vol. 3, p. 175 (General Court, 1659).

7. For telling two lies in a petition to the court; fined 20 shillings. Id., Vol. 3, p. 223 (General Court, 1656-1657).

8. For turbulent and clamorous carriage in court; committed during court's pleasure. Id., Vol. 4, p. 50 (General Court, 1663-1664).

9. For telling a lie to the court regarding his theft of liquor; fined 10 shillings. Id., Vol. 4, p. 106 (General Court, 1665).

10. For turbulent behavior during time of last court; fined 20 shillings. Id., Vol. 5, p. 10 (General Court, 1668).

11. For coming into court drunk; fined 40 shillings. Vol. 5, p. 173 (General Court, 1675).

12. Presented for horrible and abusive speeches and actions including some in the presence of the court; sentenced to be publicly whipped. Id., Vol. 5, p. 31 (Court of Assistants, 1669-1670).

13. For pilfering and stealing and for "intolerable" lying in his examination concerning the same; to be severely whipped. Id., Vol. 5, p. 51 (Court of Assistants, 1670).

14. For profanely swearing in the presence of the court; fined 10 shillings. Id., Vol. 5, p. 253 (Court of Assistants, 1677-1678).

15. For coming drunk into court and otherwise be-

having unseemly; fined. Id., Vol. 6, p. 116 (Court of Assistants, 1683).

Massachusetts Bay: Second Charter

1. On appeal from contempt judgment for "misbehaving" in court; affirmed and contemnor fined 3 pounds and ordered to pay costs. Ms. Superior Court of Judicature Judgment Book, 1700-1714, p. 263.

2. For misbehavior by juror at trial; fined 20 shillings. Id., 1721-1725, p. 135.

3. For attempting in court to snatch some papers from an adversary's hand; committed (no term specified). Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772, p. 338.

Commonwealth of Massachusetts

1. For insulting sheriff who was in attendance at court; committed for contempt (no term stated), later released on petition. Ms. Supreme Judicial Court Judgment Book, February to June 1785, p. 67.

2. For "disturbance during a capital tryal"; committed (no term stated), but released at the conclusion of the trial, paying prison charges. Id., February-June 1786, p. 108.

3. For uttering "indecent expressions" by witness at trial; committed until further order, later fined 6 shillings and discharged after paying prison charges. Id., June-November 1786, p. 254.

D. *Failure of Jurors to Attend Court*

Massachusetts Bay: First Charter

1. For non-attendance as a juror; fined 10 shillings (Records of the Colony of the Massachusetts-Bay in

New England, Vol. 1 (ed. N. B. Shurtleff, 1853) p. 108, 1633) (all entries in this paragraph relate to the General Court); for non-attendance by two jurors, each fined 6s., 8d. (id., Vol. 1, p. 232, 1638); General Court ordered that if a town refused to send grand jurors, then it was to be fined according to court order (id., Vol. 3, pp. 83-84, 1655); for refusing to serve on a jury; fined 10 shillings (id., Vol. 3, p. 224, 1657); for absenting self when warned to attend for service on jury; liable to fine unless satisfied court of excuse (id., Vol. 4, p. 29, 1662); for non-appearance for jury service; fined (id., Vol. 4, 107, 1665); for failing to attend as juror; summoned to appear at next court to answer (id., Vol. 4, p. 141, March, 1666-1667).

2. For non-appearance for service on jury at Quarter Court; fined 6s., 8d. (Records of the Colony of the Massachusetts-Bay in New England, Vol. 1, p. 316, 1641).

3. For non-attendance as juror, fined 10 shillings (Records of the Court of Assistants of the Colony of Massachusetts-Bay, Vol. 2 (1630-1644), p. 35) (this and the other entries in this paragraph relate to the Court of Assistants); for non-appearance by two jurors, fined 6s., 8d. each (id., Vol. 2, p. 74); for non-appearance of grand juror, fined 5 shillings (id., Vol. 2, p. 76); for non-attendance of two jurors; fine 6s., 8d. each (id., Vol. 2, p. 97); for non-appearance of four jurors; fined 5 shillings or 6s., 8d. each (id., Vol. 2, pp. 102-103); for non-appearance of two jurors, fined 5 shillings and 6s., 8d. (id., Vol. 2, pp. 105, 107); for non-appearance of juror, fined 5 shillings, but remitted upon explanation

(id., Vol. 2, p. 108); for non-attendance of juror, fined 5 shillings (id., Vol. 2, p. 125); for absences from court after warning; fined 3s., 4d. each (id., Vol. 2, p. 128); for absence when jury was called; fined 6s., 8d. (id., Vol. 2, p. 132); for non-appearance of juror; fined 5 shillings (id., Vol. 2, p. 137); for absence of grand juror; fined 6s., 8d. (id., Vol. 2, p. 138); for absence of petit juror; fined 5 shillings (id., Vol. 2, p. 138); for non-appearance of petit juror; fined 5 shillings (id., Vol. 1, 1673-1692, p. 305).

New Plymouth Colony

1. For "not seasonably" appearing in court for petit jury service; fined 5 shillings (New Plymouth Colony Records, Vol. 3, p. 42, 1653); for refusing to serve on a jury for laying-out of highways; fined 5 shillings (id., Vol. 4, p. 65, 1663); for non-appearance to serve on petit jury; five persons each fined 10 shillings, but some fines remitted when excuses accepted (id., Vol. 6, p. 200, 1686). (The above entries relate to the Court of Assistants.)

E. *Failure of Witnesses to Appear or Testify*
New Plymouth Colony

1. For absence from General Court as a duly summoned witness; fined 5 shillings. New Plymouth Colony Records, Vol. 1, p. 106 (1633).

2. For refusing to give evidence before a magistrate in reference to the grand inquest and for the same refusal "aggravated by circumstances"; fined 10 and 40 shillings, respectively. Id., Vol. 4, p. 116 (General Court, 1665/6).

Massachusetts Bay: First Charter

1. For non-appearance as witnesses; fined 5 and 10 shillings respectively. Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 2 (1630-1644), pp. 33, 43 (1634).

2. For failure by three persons to attend court and give evidence; fined 10 shillings each, but later remitted on excuse. Id., Vol. 1, p. 315 (1689/90).

Commonwealth of Massachusetts

1. *Capias* issued for defaulting witness, "as well to answer for his Contempt in not Obeying his legal Summons as to give evidence in said Cause." Ms. Supreme Judicial Court Judgment Book, 1783, p. 164.

F. *Failure to Assist Court Officers*
New Plymouth Colony

1. For refusing to aid the constable's deputy in the execution of his office; committed during the pleasure of the court. New Plymouth Colony Records, Vol. 3, p. 124, Oct. 1657 (General Court).

2. For refusing to assist a marshal in the execution of his office; fined 10 shillings. Id., Vol. 3, p. 158, March 1658/9 (General Court).

3. For refusing to assist a marshal in the execution of his office; two persons fined 10 shillings apiece. Id., Vol. 3, p. 173, Oct. 1659 (General Court).

4. For refusing three times to assist a marshal in the country's service; fined 20 shillings. Id., Vol. 3, p. 173, Oct. 1659 (General Court).

5. For refusing to aid marshal in execution of office; offenders fined 15 and 30 shillings, respectively. Id.,

Vol. 3, pp. 190-91, June 1660 (General Court).

6. For refusing to aid marshal in execution of office; fined 20 shillings. Id., Vol. 3, p. 221, June 1661 (General Court).

G. *Refusal to Serve as Court Officers*
New Plymouth Colony

1. Ordered by General Court that if town constable failed to take oaths, he was to be liable to a fine. New Plymouth Colony Records, Vol. 3, pp. 83-84 (1655).

2. For refusal by constable to take oath; fined 50 shillings. Id., Vol. 3, p. 100 (General Court, 1656).

3. For refusing to serve as constable; fined 50 shillings. Id., Vol. 3, p. 168 (General Court, 1659).

4. For refusing to serve as constable; fined 50 shillings. Id., Vol. 3, p. 174 (General Court, 1659).

H. *Failure to Perform Official Duties*
Massachusetts Bay: First Charter

1. For constable warning jury too late and for wrong day; constable fined 6s., 8d. Records of the Colony of the Massachusetts-Bay in New England, Vol. 1, p. 316 (Quarter Court, 1641).

2. For failure of constable to properly warn jurors; fined 6s., 8d. Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 2 (1630-1644), p. 108 (1641).

3. For failure of constable to warn juror; fined 2d. Id., Vol. 2, p. 119 (1642).

4. For failure of a constable to return a warrant; fined 10 shillings. Id., Vol. 2, p. 137 (1643).

5. For failure of constable to warn juror; fined 2d.

Records of the Court of Assistants, 1641-1644, reprinted in Colonial Laws of Massachusetts, 1672 (ed. Whitmore, 1890), p. xxx (1642).

6. For sheriff's disobedience in failing to appear as summoned and "for his neglects and misconduct in his office"; sheriff admonished. Ms. Records of the Governor and Council, 1740, p. 369.

New Plymouth Colony

1. For under-marshall's unfaithful performance of his duties, especially in allowing a prisoner to escape; court ordered him dismissed from office. New Plymouth Colony Records, Vol. 5, p. 40 (General Court, 1670).

Massachusetts Bay: Second Charter

1. For failure of two constables to return the venire; amerced "one Noble" and "five Nobles", respectively, the latter remitted, however. Ms. Superior Court of Judicature Judgment Book, 1692-1695, p. 99.

2. For non-attendance at court by two deputy sheriffs; fined 10 shillings each. Id., 1747-1750, p. 42.

3. For constable's failure to execute a warrant; fined 30 shillings. Id., 1763-1764, p. 238.

4. For coroner's "misbehaviour in said office"; fined 20 shillings and ordered to pay costs. Id., 1764-1765, p. 180.

Commonwealth of Massachusetts

1. For deputy sheriff allowing a committed defendant to go at large without paying his fine; sheriff "amerced for the malfeasance of his said Deputy." Ms. Supreme Judicial Court Judgment Book, 1784, p. 84.

2. For constable permitting a prisoner to escape;

bound in 100 pounds surety to appear in court and answer same. Id., Feb.-June 1786, p. 75.

3. For constable permitting prisoner in his custody to go at large; amerced 6 pounds. Id., Sept. 1788 to April 1789, p. 154.

4. For sheriff's negligence in allowing prisoner to escape; amerced 10 pounds. Id., 1790, p. 199.

I. *Failure to Comply with Process*
Massachusetts Bay: First Charter

1. For three members being absent from the court at the appointed time; each was fined one noble. Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 2 (1630-1644), p. 4 (1630).

2. For non-appearance at the court after having been summoned; fined 10 shillings. Id., Vol. 2, p. 14 (1631).

3. For contempt of authority by refusing to come to court after being summoned; fined 5 pounds. Id., Vol. 2, p. 27 (1632).

4. For non-appearance at court and production of inventory; fined 10 shillings. Id., Vol. 2, p. 46 (1634).

5. For constables' failure to return warrants; fined 20 shillings each (two constables). Id., Vol. 2, p. 50 (1634).

6. For absence from the court; member fined 10 shillings. Id., Vol. 2, p. 54 (1635).

7. For failure to answer an "accusation"; attachment for contempt ordered. Id., Vol. 2, p. 66 (1636).

8. For constables' failure to return warrants; fined 10 shillings each (two constables). Id., Vol. 2, p. 76 (1638).

9. For neglecting to obey a warrant; fined 10 shillings. Id., Vol. 2, p. 93 (1640).

10. For non-appearance of three persons to answer charges of excessive drinking and distemper; fined 40 shillings each. Id., Vol. 2, p. 136 (1643).

11. For absence from the court; member fined 12d. Id., Vol. 1, p. 52 (1675).

12. For non-appearance at court; fined 10 pounds, but reduced to 5 pounds on petition and payment to marshal. Id., Vol. 1, p. 103 (1677).

13. For failing to obey a warrant served by a constable; fined 10 shillings. Records of the Colony of Massachusetts-Bay in New England, Vol. 1, p. 296 (Quarter Court, 1640).

New Plymouth Colony

1. For neglecting to appear at court when summoned; fined 10 shillings. New Plymouth Colony Records, Vol. 3, p. 221 (General Court, 1661).

2. For non-appearance and non-attendance at court and for disorderly departure therefrom; ten persons fined 20 shillings each, but fines remitted since these were first offenders. Id., Vol. 6, p. 221 (General Court, 1689).

Massachusetts Bay: Second Charter

1. For non-attendance of six persons at the court; fined 4 shillings each. Ms. Superior Court of Judicature Judgment Book, 1700-1714, p. 292.

2. For non-appearance of defendant; court excused him after defendant offered his excuses, paying costs. Id., 1721-1725, p. 64.

Commonwealth of Massachusetts

1. For "contempt of authority in not appearing on the summons" and for failure to return proper inquisitions; fined 12 shillings on first contempt and 6 shillings on the second. Ms. Supreme Judicial Court Judgment Book, 1781-1782, p. 5[illegible].

2. For constable's failure to return venire; after giving excuse, discharged, paying costs. Id., 1781-1782, p. 158.

3. Constable summoned "to answer for his neglect and contempt in not returning the writ of Venire facias". Id., 1783, p. 264.

4. For failure of constable to return venire; summoned to court to answer the same. Id., Feb.-June 1786, p. 236.

5. For failure of constable to return venire; fined 20 shillings. Id., 1794, p. 274.

6. For failure of constable to return writ of venire facias; fined 20 shillings. Id., 1795, p. 344.

7. For failure and "contempt" of constable in not returning a writ of venire facias; summoned and excused, paying costs. Id., 1796, p. 323.

J. *Failure to Obey Court Rules and Orders*
Massachusetts Bay: First Charter

1. For an assistant whipping two persons without the presence of another assistant, contrary to court order; fined 5 pounds. Records of the Court of Assistants of the Colony of Massachusetts-Bay, Vol. 2 (1630-1644), p. 9 (1630).

2. For breach of order of court, drunkenness, quar-

reling and contempt of authority; fined 10 pounds. Id., Vol. 2, p. 35 (1633).

3. Upon presentment by a grand jury for having violated a court order, for having his daughter deliver a paper to a juror outside of court, and for having broken "the rule of hospitality and the peace"; found guilty of "contempt" by a jury but apparently remitted. Id., Vol. 2, p. 78 (1638).

4. For having violated a court order against showing certain books; fined 10 shillings. Id., Vol. 2, p. 87 (1639).

5. For contempt in disobeying an order of court; fined 5 pounds. Id., Vol. 2, p. 129 (1642).

6. For "neglect, in not carefully attending the Order of Cort"; fined ten shillings. Records of the Court of Assistants, 1641-1644, reprinted in The Colonial Laws of Massachusetts, 1672 (ed. Whitmore, 1890), p. XXXV.

7. For contempt of an order of the General Court; committed "till the Generall Court shall take further order therein." Records of the Court of Assistants of the Colony of Massachusetts Bay, Vol. 3, p. 171 (1666).

New Plymouth Colony

1. For "drunkeness"; disenfranchised and ordered to wear the letter "D" on his outer garment for one year, and, upon failure to do so, to be fined 40 shillings for the first offense, 5 pounds for the second offense and for further failure, to be punished by the court as it thought meet. New Plymouth Colony Records, Vol. 1, p. 112 (General Court, 1633/4).

2. For failing to bring Indian servant into court con-

trary to governor's order; fined 40 shillings. Id., Vol. 2, p. 4 (General Court, 1640).

3. For selling a boat to Indians contrary to a warrant from the court; "disfranchised his freedom" for contempt of the warrant. Id., Vol. 3, p. 101 (General Court, 1656).

4. Sentenced to wear letter "B" on garment for blasphemy conviction, and to be whipped if found without it. Id., Vol. 3, p. 112 (General Court, 1656-1657).

5. For failing to bring daughters into court as required by warrant; fined 20 shillings. Id., Vol. 3, p. 150 (General Court, 1658).

6. For suffering persons to drink in his house contrary to a special order from the court; fined 10 shillings. Id., Vol. 3, p. 222 (General Court, 1661).

7. For "contempt" to the court; committed until either received his servant or provided for her elsewhere. Id., Vol. 1, p. 112 (Court of Assistants, 1638-1639).

8. For not appearing in court as directed by assistant; attached to furnish sureties for his appearance at next General Court. Id., Vol. 2, p. 99 (Court of Assistants, 1646).

9. For failure to obey court order to desist from erection of certain cottage contrary to law; arrested and bound by sureties to appear at the next court and in the meantime to desist from completion of the cottage. Id., Vol. 3, p. 212 (Court of Assistants, 1661).

Massachusetts Bay: Second Charter

1. For "high contempt" of a court order; discharged after grand jury returned "Ignoramus." Ms. Superior Court of Judicature Judgement Book, 1721-1725, p. 119.

NEW HAMPSHIRE

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I. Judicial Establishment

In its early years, New Hampshire constituted part of the chartered Massachusetts Bay Colony and was thus governed by its laws and courts. In 1679, New Hampshire became a separate royal province. The principal court of original jurisdiction, both civil and criminal, for the period of royal government was the Superior Court of Judicature (sometimes called the Superior Court of Judicature, Assize and General Gaol Delivery). It also exercised appellate jurisdiction over Inferior Courts of Common Pleas and Courts of General Quarter Sessions of the Peace functioning on the county level. The Governor and Council, designated a Superior Court of Appeals, exercised appellate juris-

diction over the Superior Court of Judicature. Prior to 1692, a court termed a "County Court" apparently administered justice in the county or province of New Hampshire. At the Revolution the existing court system was in substance reestablished by statute except that the Court of Appeals was abolished. The research included examination of the extant records of the pre-1692 County Court, the Superior Court and the Governor and Council.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. In 1679 the President and Council were commissioned "to be a constant and setled Court of records for the administracion of Justice", with jurisdiction in criminal and civil matters, and with power and authority, *inter alia,* "to summon and convene any person or persons before them and punish contempts." Laws of New Hampshire, Vol. 1, Province Period (1679-1702) (Batchellor, editor, 1904), pp. 3-5.

B. *Defamation or Abuse of Court or Court Officials*

1. The General Laws and Liberties of the Province, made March 16, 1679, provided that any person who defamed any court, judge or member of the "Councel" regarding "any Act or Sentence therein passed * * * shal by the Councel be punished by fine, imprisonment, binding to the Peace, or Good behavior, according to the quality and measure of the offence or disturbance, to them seeming just and equal." Laws of New Hampshire, Vol. 1, p. 19.

C. *Misconduct in Court*

1. By a law of September 19, 1776, any person who used "menacing Words, Signs, or Gestures, in the presence of a Court Martial then sitting, or shall Cause any Disorder or Riot, so as to disturb their proceedings" was liable to punishment "at the Discretion of the said Court Martial." Laws of New Hampshire, Vol. 4, Revolutionary Period (1766-1784) (Metcalf, editor, 1916), pp. 39, 55. (Statute repealed on March 18, 1780.)

D. *Failure of Jurors to Attend Court*

1. A law of August 17, 1699, provided for forfeitures of 40 shillings for non-appearance by duly-summoned jurors in the various courts of the province. Laws of New Hampshire, Vol. 1, pp. 657-659.

2. An act of March 1, 1754, provided for a fine of 5 pounds for non-appearance in the Superior Court of Judicature by petit jurors; and for a fine of 3 pounds for non-appearance by grand jurors in the Superior Court of Judicature or the Court of General Sessions of the Peace. Id., Vol. 3, Province Period (1745-1774) (Metcalf, ed., 1915), pp. 71-72. (Repealed June 20, 1792.)

3. By a May 7, 1754 act non-attendance by grand jurors in the various courts of the colony subjected the offenders to fines of 3 pounds. Id., Vol. 3, pp. 87-88. Another act of that date also provided that non-attending petit jurors "Shall be Liable and Subject to the fine and Penalty Provided and Inflicted on Jurors making Default of Appearance by the Laws now in force." Id., Vol. 3, pp. 89, 91. (These statutes were repealed on June 20, 1792.)

4. By a January 16, 1771 law non-appearance by

grand jurors subjected the defaulters to fines of 20 shillings; non-attendance by petit jurors subjected the defaulters to fines of 30 and 15 shillings for defaults before the Superior Court and the "Inferiour Court or Court of General Sessions of the Peace", respectively. Id., Vol. 3, pp. 547-548. (This statute was repealed on June 20, 1792.)

5. A statute of June 17, 1785, provided for a penalty of 30 shillings for non-attendance of petit jurors. Id., Vol. 5, First Constitutional Period (1784-1792) (Metcalf, ed., 1916), pp. 67-68.

6. A February 8, 1791 statute provided for a fine of 3 pounds upon grand jurors who failed to attend the Superior Court of Judicature. Id., Vol. 5, pp. 584, 586.

7. A statute of June 10, 1791, provided for a fine of 40 shillings for non-appearance by jurors in court, one-half to the use of the prosecutor and one-half to the use of the county. Id., Vol. 5, pp. 747, 749.

E. *Failure of Witnesses to Appear or Testify*

1. A law of March 18, 1780, provided that all persons called to give evidence before a Court Martial who refused to appear or give evidence "Shall be Committed to the Common Goal" of the county where the Courrt Martial was sitting and "there to remain Six months unless Sooner Released therefrom by the Justices of the Superiour Court." Laws of New Hampshire, Vol. 4, pp. 273, 283.

2. A statute of February 8, 1791, provided that any person duly summoned as a material witness in a criminal proceeding who failed to appear in court or failed to testify "shall forfeit and pay one hundred Pounds to any Person * * * who will sue for the same in this

State." Id., Vol. 5, First Constitutional Period (1784-1792) (Metcalf, ed., 1916), pp. 596, 602-603.

3. By a statute of February 9, 1791, any person summoned to testify or give a deposition before any court, justice or referee, and who neglected to attend or refused to give such evidence, was to be liable to the action of the aggrieved party for all damages sustained by such default, and, in addition, be subject to attachment for contempt and to a fine of not more than 10 pounds if such contempt was committed before any court of judicature, and to a fine of not more than 40 shillings if the contempt was committed before a justice of the peace, together with costs of the attachment. Id,, Vol. 5, pp. 621, 628-629.

F. *Failure to Perform Official Duties*

1. By statute of February 8, 1791, town clerks who failed to summon grand jurors as directed, or who failed to return the precept issued by the Superior Court of Judicature, were to be fined not to exceed 5 pounds. Id., Vol. 5, pp. 584, 586.

G. *Failure to Comply with Process*

1. An act of October 11, 1680-81, provided that any person duly summoned to answer any presentment or for any fact or misdemeanor who failed to appear at the appointed time was to "be proceeded against for contempt", except where prevented from appearing by the hand of God. Laws of New Hampshire, Vol. 1, p. 35.

2. An act of March 3, 1686-7, provided that failure of a defendant to appear and answer a complaint in a

civil cause before a justice of the peace authorized said justice to issue a "Warrant of Contempt" against the defendant and to fine the contemnor not in excess of 10 shillings. Id., Vol. 1, pp. 194-195.

3. By statute of June 10, 1791, any constable who "unnecessarily" failed to execute or return any warrant for the return of jurors was to forfeit 40 shillings. Id., Vol. 5, pp. 747, 749.

4. By statute of February 16, 1791, any person who knowingly and wilfully obstructed, resisted or opposed any sheriff or other officer of the state in serving or attempting to serve any legal process, or who assaulted or wounded any officer or person authorized to serve such process, or who by force set at liberty or rescued any person duly arrested or committed, should "upon conviction be imprisoned not exceeding twelve months and fined in a sum not exceeding ninety pounds." Id., Vol. 5, pp. 718, 721.

III. Contempt Cases Arising Under Colony and State Acts

A. *Defamation or Abuse of Court or Court Officials.*

1. For stating that he would "Pluck Captaine Wiggin [the Chief Judge] of the bench"; two sureties were required to give bond that defendant would appear at the next court to answer the "complainte of this Courte." New Hampshire State Papers, Vol. 40 (1943), p. 60; Ms. Province Deeds, Vol. 1, p. 74 (County Court, 1650). This volume and other manuscript court records referred to below are at the New Hampshire Division of Records Management and Archives, Concord, New Hampshire.

2. For giving out "reproachful words" against a judge; ordered to be whipped and fined (amount not specified) unless contemnor made a public apology within 4 months. Ms. Province Deeds, Vol. 2, p. 10a (County Court, 1655).

3. For showing contempt to the court by "words and gestures"; ordered to sit in the stocks for one hour. Later, upon questioning by the court, the contemnor was determined to be a "vagabond Quaker" and was sentenced to be whipped 30 stripes and to pay court fees of 30 shillings. Ms. Province Deeds, Vol. 2, p. 76a (County Court, 1663).

4. For "givinge out Reproachfull spechis against the worshipful Captin Wiggins" (the Chief Judge); contemnor sentenced to make a "publique adknowledgment" on three different public days within 4 months, and, upon default, to be whipped not exceeding ten stripes, fined 5 pounds, and court fees of 2 shillings, 6 pence. New Hampshire State Papers, Vol. 40, p. 115 (County Court, 1665).

5. For publicly opposing a sentence of the court concerning the whipping of one David Cambel; two offenders were each fined 3 pounds and 50 shillings and ordered to stand committed until the fines were paid, to give bonds of 10 pounds each for good behavior, and to appear at the next court. Ms. Province Deeds, Vol. 2, p. 205 (County Court, 1673). Later, one of the contemnors, John Shurband, Jr., petitioned the court for remission of fine and bond. The petition, c. 1678-1679, recited, *inter alia,* that the petitioner "did Inadvisedly psuade the Constables servant not to whipp David Cambel", that he did this not out of disrespect to the court

or to subvert justice but out of friendship to David Cambel and his father, and that the court fined him and required him to post bond for his good behavior. Ms. Court Papers, Vol. 4 (1678-1679), p. 45 (New Hampshire Division of Records Management and Archives) (County Court).

6. For "giving out thretning speeches and carrying of it contemptuously in Court"; ordered to be bound to good behavior, and, upon his refusal, was ordered committed until he gave bond with security. Upon acknowledgment of his faults, court released defendant of his bond and merely ordered him to pay court fees. Ms. Province Deeds, Vol. 2, p. 201 (County Court, 1673).

7. For "having behaved himself contemptuously to the Court and spoken prophane, if not blasphemous words"; ordered to enter into a recognizance of 100 pounds (50 pounds of which to be supplied by a surety) for good behavior and to appear at the next court. New Hampshire State Papers, Vol. 40, p. 392 (Court of Pleas, 1682).

8. For utterance c. 1728 by one Benjamin Rust of seditious words tending to the contempt of the Lieutenant Governor and Council as a court; after hearing before the Council, Rust ordered to give security for appearance before the Superior Court of Judicature to which "the Enquiry of these things more strictly belongs" and to answer the same "and to be further done with as to law and Justice appertains". Ms. Council Records, Vol. 4 (1680-1740), p. 230 (N. H. Div. Rec. Management and Arch.). Thereafter, a jury in the Superior Court found defendant Rust guilty of having uttered "Scandalous words" against the Governor and

Council; he was ordered by the court to post bond of 800 pounds with two sureties to appear at adjournment time in court, or to stand committed. On the following day, defendant was released on a 250 pound bond with two sureties to appear at the February Term 1729, and to be of good behavior in the meantime. The sheriff subsequently returned on a writ of *scire facias* that the defendant had forfeited his bond by a breach of the peace on December 5, 1728. File No. 18223, unbound court papers (N. H. Div. Rec. Management and Arch.).

9. One Pearce was ordered to show cause why an attachment for contempt should not issue against him for having insulted Clement March, one of the judges of an Inferior Court of Common Pleas "for his sentiments delivered on the Bench and in due execution of his Office"; Pearce's plea of not guilty and request for jury trial were rejected, and, after having determined that Pearce had offered insults to Judge March in the street, the Inferior Court of Common Pleas ordered him to make submission to the court for his contempt and find sureties in the amount of 10 pounds for his good behavior for 3 months, and to stand committed until the sentence be performed. On certiorari to the Superior Court of Judicature, in the February 1770 term, Pearce asserted that he was not guilty of contempt because the words were not spoken in court or during a session of the court and because Judge March was not participating in the trial of Bennet v. March in the Inferior Court as the judge's brother was a party to the case. Apparently Pearce had asked March why he had called him "chattering fellow" in court during the Trial of Bennet v. March and had said March "was

a Blockhead as much as in a Barber's Shop and called him a Rogue." The court then quashed the proceedings in the Inferior Court of Common Pleas, no one appearing for the purpose of showing cause why the proceedings should not be quashed. Ms. Superior Court Judgment Book, Vol. F (1768-1770), pp. 449-62 (N. H. Div. Rec. Management and Arch.).

Later Pearce sued March for 200 pounds for malicious prosecution, contending, *inter alia,* that he, Pearce, spent 8 hours in the Portsmouth jail until admitted to bail by the Chief Justice of the Superior Court. The jury found for defendant March, and Pearce appealed. On appeal to the Superior Court, Pearce was given a *de novo* jury trial, the earlier judgment was reversed and Pearce was awarded 7 pounds damages and costs of court. Ms. Superior Court Judgment Book, Vol. G (1770-1773), pp. 128-232 (September Term 1771).

IV. Extension of Laws of England to Colony or State

1. In April 1777, an act was passed for the reestablishing of the general system of laws theretofore in force in the State. It provided, "That all the Acts and Laws in force in this State (at the Time the present form of Government was Assumed) with every article Direction and Power in the same contained, so far as they are not repugnant to, and incompatible with the present Form of government in this State, and its Independence on [sic] Great Britain, or are not repealed and disannulled, or altered by any Act or law made and passed by the Council and House of Representatives of this State since the said Assuming of Government, be re-

vived reenacted directed and ordered to abide and remain in full force and accordingly to be exercised practised and put in Execution." Laws of New Hampshire, Vol. 4, *supra*, p. 87 (Metcalf, ed., 1916). In *State* v. *Rollins*, 8 N. H. 550 (1837), it was stated with respect to the above statutory provision that:

> "It is perfectly apparent that the body of the common law, as previously in force, was comprehended in this enactment . . . for there is nothing to indicate that a separation was then to be made in it, and such parts only of it as could be shown to have been actually used in the courts of justice, to be adopted, and the residue, which was in force before, although not shown to have been used, to be rejected. If any part of it was within the act, the whole body of it, previously in force, was so, except such parts as were incompatible with the new form of government."

2. The 1784 Constitution provided that "All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New-Hampshire, and usually practiced on in the courts of law, shall remain and be in full force, until altered and repealed by the legislature; such parts thereof only excepted, as are repugnant to the rights and liberties contained in this constitution." Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws, Vol. 4, pp. 2453, 2469.

V. Contempt Cases Arising Under Common Law or Usage

1. For stating that grand jury presented him out of malice; contemnor admonished and ordered to pay fine

of 2 pounds and 6 shillings. Ms. Province Deeds, Vol. 1, p. 29 (County Court, 1645).

2. For non-attendance as grand juror and for having told constable that he would not serve as grand juror; fined 6 shillings and 8 pence. New Hampshire State Papers, Vol. 40, p. 61 (County Court, 1650).

3. For accusing grand jury of injustice in presenting his servant for fighting, and for threatening that he would "present [grand jury] for their unjust presentment"; ordered to make a public acknowledgment at the next court or be fined 5 pounds. Ms. Province Deeds, Vol. 2, p. 12b (County Court, 1655).

4. For refusing to remove hat in court after having been ordered to do so; sentenced to be set by the heels for 1 hour and to pay court fees. Id., Vol. 2, p. 75b (County Court, 1663).

5. For non-attendance as grand juror; fined 20 shillings unless defendant took oath to serve on grand jury. New Hampshire State Papers, Vol. 40, p. 314 (County Court, 1675).

6. For "Contemptuous Carriage" by grand juror; fined 5 shillings (Ibid.).

7. For contempt of authority and abusive conduct toward constable; court ordered contemnor to stand in some public place with a paper pinned to his back bearing the inscription in capital letters, "A contemner of Authoritie", to pay costs of 20 shillings (ten of which was to go to the constable abused) and fees. Id., p. 367 (County Court, 1680).

8. For "affronting the Constable"; upon plea of guilty to presentment by grand jury, contemnor ordered to pay a fine of 3 pounds and costs of prosecution, and

to stand committed until the fine was paid. Id., p. 400 (County Court, 1686).

9. For affronting a constable; defendant ordered to pay a fine of 40 shillings, taxed 26 shillings in costs and fees, and required to give a bond for good behavior and appearance at the next session of the court. Id., p. 401 (County Court, 1686).

10. For an unspecified "contempt" by a justice of the peace; contemnor to appear before Governor and Council and answer. Ms. Council Records, Vol. 2 (1692-1701), p. 3 (N. H. Div. Rec. Management and Arch.).

11. For an unspecified contempt in open court; contemnor fined 10 shillings and costs, and to stand committed until sentence complied with. Another entry shows that contemnor was committed to prison, no term specified. Ms. Court Papers, Vol. 10 (1693-1694), p. 314 (County Court).

12. For refusal by several persons to obey constable's warrant issued pursuant to the President's warrant, and for insults offered to the constable; after a jury trial, one defendant was found guilty and ordered to pay a fine of 4 pounds and costs, and to stand committed until the fine was paid. Id., Vol. 10, p. 324 (County Court).

13. For disobedience by two persons to constable who was serving warrant on one David Allen, and for allowing Allen to escape; contemnors ordered to enter into bonds of 50 pounds each, with sureties, and to save the town harmless for the support of a bastard child reputedly fathered by David Allen. Later, one defendant was fined 40 shillings for his conduct above and for "open contempt in Court" and the other defendant

fined 20 shillings for contempt. Each defendant ordered to stand committed until sentence complied with and to pay court costs. Id., Vol. 10, pp. 376-78 (County Court).

14. For resisting a constable in the execution of his office by three contemnors; one fined 10 shillings and costs and the others each fined 5 shillings and costs, with all three ordered to stand committed until such sums were paid. A subsequent entry shows that one offender was fined an extra 10 shillings and another an extra 5 shillings for "being Refractory and Reflecting on the Justices." Ms. Superior Court Minutes, 1699-1738, p. 114 (1717-1718) and File No. 17643, Unbound Court Papers (N. H. Div. Rec. Management and Arch.).

15. For an unspecified contempt of court; contemnor ordered to pay fine of 10 shillings, and constable to take him into custody until the fine and charges were paid. Ms. Judgment Book, Court of Quarter Sessions of the Peace, p. 31 (Court of Quarter Sessions of the Peace, 1717) (N. H. Div. Rec. Management and Arch.).

16. For persistence in adulterous conduct by John Drew and Rebecca Cook after having been repeatedly fined therefor; for such "contempt", the court ordered Drew to pay a fine of 20 pounds or else receive 20 lashes and wear the letter "A" for one year. Drew paid the fine "as also the Cost for himself and the said Rebacca Cook." Ms. Superior Court Minutes (1699-1738), p. 134 (August 12, 1719). A prior entry in the Court of Quarter Sessions of the Peace showed John Drew to be continued on bond "for his not Cohabitting with Rebecca Cooks and that he appear next term." Ms. Minutes, Court of Quarter Sessions of the Peace, Vol. 37b, p. 21 (March 4, 1717) (N. H. Div. Rec. Management and Arch.).

NEW JERSEY

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I. Judicial Establishment

The principal court of original jurisdiction in proprietary East New Jersey was the Court of Common Right (1682/3-1702) with power and jurisdiction "to

hear, try and determine all matters, causes and cases, capital, criminal or civil causes of equity and causes tryable at common law." Earlier a Court of Assizes had existed but none of its record have survived. In proprietary West New Jersey, a Quaker settlement, a court, sometimes designated a Court of Sessions and Pleas was held at Burlington from 1680 onward, exercising original jurisdiction in civil and criminal matters. A Court of Oyer and Terminer to try serious offenses was authorized in 1693, and a court of Appeals was established in the same year. The extant records of the Court of Common Right and the Court of Sessions and Pleas were examined.

Shortly after New Jersey became a royal province (1702) a court system was established by ordinance (1704) consisting of a Supreme Court of Judicature with cognizance of all pleas, civil, criminal and mixed, to the same extent as the courts of Queens Bench, Common Pleas and Exchequer in England. This court also exercised appellate jurisdiction over Courts of Common Pleas and Courts of General Sessions of the Peace established on a county basis. The Governor and Council exercised the ultimate appellate jurisdiction in the province. This system of the colonial period continued after independence except that a Court of Appeals replaced the Governor and Council as the appellate tribunal. All the remaining records of the Supreme Court were examined; the records of the Governor and Council as an appellate body were apparently destroyed during the Revolution.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. A 1668 act of the Assembly of East New Jersey provided that persons who resisted the authority established by the Lords Proprietors, or the Governor, justices or any other inferior officers, whether by "words or actions," should be "liable to such fine or corporal punishment as the court shall judge." The Grants, Concessions, and Original Constitutions of the Province of New Jersey, 1644-1702, pp. 77-78 (editors, Leaming and Spicer, 1881).

2. Another 1668 act of the East New Jersey Assembly provided for similar penalties for anyone who "shall abuse, contemn or resist the lawful authority" of officers or magistrates of the province in the execution of their respective offices "or at any other time." Id., p. 83.

B. *Defamation or Abuse of Court or Court Officials*

1. A 1675 law of the East New Jersey Assembly provided for "fine, banishment or corporal punishment" for anyone who beat, wounded or spoke reproachfully, contemptuously or maliciously toward certain officers (including marshals and constables) or magistrates of the province. Grants, Concessions, and Original Constitutions, p. 99. The law was re-enacted in substance in 1682 with sheriffs in place of marshals and the penalty of banishment eliminated. Id., p. 240.

2. A 1681 statute enacted by the Assembly of West New Jersey provided that anyone who "shall presume to offer affront to the publick authority of this Province, or any officiating in that capacity" shall be "pun-

ished and fined" according to the court's discretion. Id., p. 432.

C. *Misconduct in Court*

1. A statute enacted on March 15, 1683, by the Assembly of West New Jersey provided that, upon conviction of drunkenness before a magistrate, the offender was to be fined 3 shillings and 4 pence, or sentenced to sit in the stocks not exceeding five hours. Grants, Concessions, and Original Constitutions, p. 460.

2. Under a statute of March 16, 1798, anyone who swore in the presence of a justice of the peace "while in the execution of his office" was subject to conviction for such offense "without any other proof whatsoever." Acts of the General Assembly of the State of New Jersey, 1779-1801, 22nd Assembly, ch. DCCXXXVI.

D. *Failure of Jurors to Attend Court*

1. An act of December 2, 1675, of the East New Jersey Assembly made refusal to serve as grand jurors punishable by fines of 30 shillings. Grants, Concessions, and Original Constitutions, p. 101.

2. An act of March 11, 1713-14, provided for a fine of 20 shillings for each person who refused to serve as a petit juror in cases involving runaway slaves. Acts of the General Assembly of the Province of New Jersey, 1702-1776, p. 20.

3. An act of October 6, 1777, provided that grand or petit jurors who failed to attend court or to take the "Oaths of Abjuration and Allegiance" were to be fined between 5 and 20 pounds. Acts of the General Assembly of the State of New Jersey, 1776-1783, p. 28.

4. A statute passed by the General Assembly c. 1778

provided for a fine of 10 pounds for jurors who neglected to serve at trials concerned with the confiscation and forfeiture of the estates of certain fugitives and offenders. Id., p. 51. A supplement to this statute, enacted on June 11, 1779, provided for fines for non-attendance of jurors of from 3 to 30 pounds. Id., p. 95.

5. By statute of December 6, 1782, a justice was permitted to fine a non-attending juror up to 10 shillings. Id., p. 315.

6. By statute of December 21, 1782, any juror who failed to attend a court held by a justice of the peace could be fined 30 shillings. Id., p. 320.

7. Under a statute of March 8, 1796, non-attendance of a juror at a coroner's inquest was to be dealt with by the Court of General Gaol Delivery by a fine not exceeding $50. Acts of the General Assembly of New Jersey, 1779-1801, 20th Assembly, ch. DLXXX.

8. By a law of November 10, 1797, non-attendance for duty as grand jurors and petit jurors made the defaulting persons liable to a fine not exceeding $20 and $16, respectively. Id., 22nd Assembly, ch. DCLXXIV.

9. A statute of March 9, 1798, provided that where a full panel of jurors was lacking in the Supreme and Circuit Courts, the sheriff might be directed to obtain talesmen, and, if any of those named "be present, and do not appear, or after his or their appearance, do willfully withdraw him or themselves from the presence of the court", they should be subject to fine not exceeding $16. Id., 22nd Assembly, ch. DCCXVII.

10. Under a statute of March 15, 1798, non-attendance as petit jurors before courts constituted for the trial of small causes subjected the defaulting parties to fines

of from $1.00 to $5.00. Id., 22nd Assembly, ch. DCCXXIX.

11. Under a statute of June 5, 1799, the Circuit Courts were authorized to draw up a tales jury and, if talesmen were present and failed to appear when called, then the court was authorized to set a reasonable fine upon defaulters, to be levied and made by distress and sale. Id., 23rd Assembly, ch. DCCXCVIII.

E. *Failure of Witnesses to Appear or Testify*

1. A statute enacted c. 1778 provided for a forfeiture of 10 pounds for the refusal by any witness to give evidence at inquests held by commissioners with respect to forfeiture and confiscation of the estates of certain fugitives and offenders. Acts of the General Assembly of the State of New Jersey, 1776-1783, p. 51.

2. By statute of June 9, 1781, a witness who failed to obey a subpoena from the president of a court martial could, upon presentment or indictment in a civil court, be fined not more than 15 pounds. Id., p. 197.

3. By statute of December 6, 1782, a justice could fine a non-attending witness up to 12 pounds. Id., p. 315.

4. By statute of December 21, 1782, a witness disobeying a summons to attend a court held by a justice of the peace could be fined 5 pounds, Id., p. 320.

5. Under statute of March 15, 1798, non-attendance by witnesses at courts constituted for the trial of small causes subjected the defaulting parties to fines of from $1.00 to $5.00. Acts of the General Assembly of the State of New Jersey, 1779-1801, 22nd Assembly, ch. DCCXXIX.

6. By a statute of June 7, 1799, any witness who failed to appear in court, after being duly summoned, was to forfeit to the party aggrieved a sum of money ascertained by the court but not to exceed $50, and, in addition, was to pay to the party aggrieved by his absence damages equal to the loss caused by the lack of his evidence, said damages to be recovered by action of trespass on the case Id., 23rd Assembly, ch. DCCIII.

F. *Refusal to Serve as Court Officers*

1. By statute of June 8, 1781, refusal to serve as a constable by one so chosen was made punishable by three justices of the peace by fine of between 10 and 30 pounds. Acts of the General Assembly of the State of New-Jersey, 1776-1783, p. 196.

G. *Failure to Perform Official Duties*

1. By statute of November 22, 1794, any justice of the peace who failed in his duty to examine capital offenders or to transmit the results of such examination to the Supreme Court of Judicature was to be fined in the discretion of the court cognizant of the offence. Acts of the General Assembly of the State of New Jersey, 1779-1801, 19th Assembly, ch. CCCCXCIV.

2. By statute of March 8, 1796, any coroner or constable who refused to perform his duties in relation to coroner's inquests, upon due examination before the Court of General Gaol Delivery, was to be fined not exceeding $500 and $50, respectively. Id., 20th Assembly, ch. DLXXX.

3. By a statute of March 18, 1796, the Courts of Common Pleas were authorized to "award attachments [for

"contempt"] and proceed thereupon" against any sheriff or coroner who disobeyed or failed to execute any writ, process or order of the court. Id., 20th Assembly, ch. DXCIX.

4. An act of June 13, 1799, provided that if a sheriff or other officer to whom any writ, process or order from the Court of Chancery had been issued "shall not make return thereof, at the day of return, and according to the tenor of such writ, process, or order", that he shall be in "contempt", and the Court of Chancery should be authorized to issue process of contempt against such person and impose a fine not exceeding $50, together with costs. Id., 23rd Assembly, ch. DCCCXIX.

III. Contempt Cases Arising Under Colony and State Acts

A. *Defamation or Abuse of Court or Court Officials*

1. For "Contempt of Authority in not obeying the magistrates in connection with a forcible entry on lands"; after indictment and jury trial, one defendant fined 5 pounds, four others fined 50 shillings each. The Burlington Court Book of West New Jersey, 1680-1709, p. 20 (American Legal Records—Volume 5) (Court of Sessions and Pleas, 1683).

2. For "abuse" to a constable and "affront of Authority"; fined 30 shillings to the constable and 30 shillings "to the Publique", and for contemnor's refusal to pay or secure the fines, he was ordered committed. Id., p. 55 (1686).

3. For "contempt of authority"; after a jury trial, contemnor found guilty with jury recommending that the fine not exceed 5 pounds. When contemnor told the

court that he could not pay the fine "if it was but two pence", the court fined him 10 pounds "to be leveyed on his Goods and Chattels forthwith." Id., p. 58 (1686).

4. For "his abuse of the Bench"; ordered to find sureties for his good behavior. Id., p. 101 (1689).

5. For contempt of authority; servant referred self to bench and ordered to stand in pillory for one hour or pay a 20 shilling fine. Id., p. 102 (1690).

6. For "menaces" to a constable and for "Scurrilous reflecting expressions" made to a justice before whom brought; committed, and upon contemnor's refusal to find securities for his good behavior, he was remanded to prison "till he Should give Security for his good behavior." Id., pp. 207-208 (1698).

7. For "stiffling the King's Evidence a Prevention of Justice and Contempt for the Laws"; fined 20 shillings, together with costs. Id., p. 262 (1701/2).

8. For "contempt of Authority" in abusing the magistrates in open court, for assaulting the high sheriff, and for "other most Enormous Crimes"; presented by grand jury and pleaded guilty; the court "taking the heynousness of his Crime into Consideration", sentenced offender to pay a fine of 40 pounds and costs, to find security for his good behavior, and to stand committed until the sentence fulfilled. Id., pp. 260, 263 (1701/2).

9. For sheriff speaking "very Contemptious and approbrous Words" to the court and justices; fined 5 pounds, and upon his refusal to pay or enter into recognizance was ordered to be "Kept in Custody." At the same court the sheriff was found not guilty by a petit

jury of saying scandalous words to a constable and dissuading others from assisting said constable. Id., pp. 301, 303 (1705).

10. For orally denying and opposing the authority of the Court of Common Right to call him before the Court to show cause in a scire facias proceeding why he had not paid "The Lords Quit Rents", the contemnor's statements being addressed to the court while sitting, fined ten pounds current money and ordered to post security in the amount of 200 pounds for his good behavior for one year. Journal of the Courts of Common Right and Chancery of East New Jersey, 1683-1702 (Id. Edsall, 1937) pp. 187-188 (November 1684 Term).

11. For demanding to know by what authority the Court of Common Right sat, said statements being directed to the court while sitting, and for resisting arrest in court; fined 50 pounds and ordered committed to prison until the fine was paid. Id., pp. 310-11 (May 1698 Term).

B. *Failure of Jurors to Attend Court.*

1. Petit juror fined $16.00 for non-attendance. Ms. Supreme Court Minutes, 1796-1797, September, 1797. (This volume and the other manuscript court records referred to below are in the Office of the Clerk, Supreme Court, State House Annex, Trenton, New Jersey.)

IV. Extension of Laws of England to Colony or State

1. The 1704 ordinance of Lord Cornbury (An Ordinance for Establishing Courts of Judicature) establishing the judicial system for New Jersey, drafted per-

haps by Roger Mompeson, the first Chief Justice of the Supreme Court of New Jersey, provided among other things that the Courts of Common Pleas thereby established in each county should have "Power and Jurisdiction to hear, try and finally determine all Action or causes of Actions, and all Matters and Things tryable at Common Law, of what nature or kind soever." The ordinance also established a Supreme Court of Judicature "fully empowered to have Cognizance of all Pleas, civil, criminal and mixt, as fully and amply, to all intents and purposes whatsoever, as the Courts of Queens Bench, Common Pleas and Exchequer, have or ought to have." It was further provided that "all and every of the Justices and Judges of the Several Courts aforementioned [the Supreme Court of Judicature, the Courts of Common Pleas and presumably the General Sessions of the Peace held in each county], be and are hereby sufficiently Impowered and authorized to make, ordain and establish all such Rules and Orders, for the more regular practising and proceeding in the said Courts, as fully and amply, to all intents and purposes whatsoever, as all or any of the Judges of the several Courts of Queens-Bench, Common Pleas, and Exchequer, in England legally do." The ordinance is printed in Keasbey, *The Courts of New Jersey: Some Account of Their Origin and Jurisdiction,* pp. 86-91.

2. In a March 1705 ordinance Lord Cornbury provided that the Governor or the Lieutenant Governor and his Council constitute a High Court of Chancery for the province and, as such, to hear and determine all causes and suits in said court in such manner, or as near as

might be, according to the usage and custom of the High Court of Chancery in England. Later the Governor alone sat as Chancellor. Keasbey, *op. cit. supra,* pp. 120-21.

3. Article 22 of the New Jersey Constitution of 1776 provided *inter alia*:

> "That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter * * * " Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws, Vol. 5, pp. 2594, 2598.

4. Shortly after independence the legislature passed an act on October 2, 1778 reciting that it was absolutely necessary that justice be duly and regularly administered and declaring that "The several Courts of Law and Equity should be confirmed, established and continued with the like powers under the present government as they held at and before the declaration of independency lately made by the honorable the Continental Congress." Keasbey, *op. cit. supra,* p. 122.

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempts*

1. For making objection against the authority of the Court of Sessions of Monmouth County in 1701; one person fined 5 pounds and the other 15 pounds. The court also fined a number of other persons 40 shillings

each "for their contempt and misb[illegible]our before this Court." Archives of the State of New Jersey, First Series, Vol. II (1687-1703), pp. 364-366.

2. For contempt of court and abusing Her Majesty's witnesses, and for refusing to find security for his good behavior; ordered that contemnor be committed "into Custody until he be Delivered by Due Course of Law." Ms. Supreme Court Minutes, 1704-1715, May Term, 1705.

3. For "Contempt of an Order of Councill"; contemnor pleaded guilty to information filed by Attorney General, decision of court postponed, and no further record of case found. Id., 1704-1715, November Term, 1707.

4. For speaking "Scandalous words against the Chief Justice"; contemnor granted a jury trial on the information, but result not specified. Id., November Term, 1704-1715, 1707.

5. For an unspecified "contempt"; after hearing before court, contemnor discharged, paying fees. November Term, 1704-1715, 1710.

6. For speaking words against the Assembly and swearing against a sheriff, defendant presented by grand jury, but no further action specified. Id., November Term, 1704-1715, 1714.

7. For a "contempt of the court"; defendant committed (nothing further reflected). Id., 1738-1744, August 1742.

8. For "high contempt of the Court"; fined 5 pounds. Id., 1738-1744, August 1742.

9. For "great abuse to contempt of the Proceeding of this Court" by four women; two fined 10 shillings each

and two fined 5 shillings each, and all of them ordered committed until they paid their fines and fees. Id., 1742-1745, August Term, 1745.

10. For "Contempt"; contemnor ordered to pay plaintiff his costs and to "stand Committed for his Contempt" (unspecified). Id., 1745-1748, May Term, 1746.

11. For speaking contemptuous words against the Chief Justice; fined 20 pounds, imprisoned for one month, ordered to provide security of 200 pounds for his good behavior for twelve months and ordered to stand committed until the sentence was fulfilled. Ms. Supreme Court Minutes, Vol. 51 (1748-1752), April Term, 1749.

12. For an unspecified "contempt" of court; upon acknowledgment by contemnor of his fault and requesting forgiveness, the court ordered defendant to post a 20 pound bond for his good behavior. Id., Vol. 51 (1748-1752), May Term, 1750.

13. For a "Certain Contempt" against one of the justices of the Supreme Court; fined 20 pounds "proclamation Money", ordered to enter into a recognizance of 100 pounds for his good behavior for one year, and ordered to stand committed until fine and fees paid. Ms. Supreme Court Minutes, Vol. 52 (1752-1755), March 1753.

14. For speaking "Contemptuous words" against the Supreme Court or one of its justices by two contemnors; one fined 5 pounds and ordered to enter into a recognizance of 50 pounds for his good behavior for 9 years, and the other ordered attached for his contempt but nothing appears later on this case. Id., Vol. 52, August Term, 1753, and November Term, 1753.

15. For some unspecified contempt by Justice John

Peck of Cumberland; after attachment for contempt and the submission to the justice of some interrogatories, the court "reprimanded" him "for his disobedience and contempt" and ordered him discharged upon payment of costs. Id., Vol. 60 (1775-1782), September 1781.

B. *Defamation or Abuse of Court or Court Officials.*

1. For appearing by an attorney, an affront to the court, fined 50 shillings. The Burlington Court Book of West New Jersey, 1680-1709 (Court of Sessions and Pleas), p. 9 (1681).

2. For "Contempt" in abusing a party serving process; attachment for contempt issued. Ms. Supreme Court Minutes, 1744-1747, August Term, 1745.

C. *Misconduct in Court.*

1. For "unhansome language" in court; fined 10 shillings. The Burlington Court Book of West New Jersey, 1680-1709 (Court of Sessions and Pleas), p. 46 (1685).

2. On March 10, 1685, the Quarterly Court of Sessions of West New Jersey opened with a proclamation that "all persons to keep silence in the Court; and to forbear offering any disturbance, or to take Liberty of speech without Lycence from the Bench, upon payne of being fyned." Id., p. 48.

3. For disturbing the court "in speaking without Lycense, declaring the Jury Empanelled, are too young to be Jurors"; no punishment indicated. Id., p. 70 (1687).

4. For "contemptuous behavior" to the court and

appearing in court "with his Hatt on"; fined 5 pounds, later upon acknowledgement reduced to 50 shillings for appearing before court drunk. Id., pp. 164-65 (1694).

5. For refusing to remove hats at the time of taking attests; one person fined 15 shillings and two jurors committed. Id., pp. 293-94, 299 (1704-1705).

6. For drunkenness and contempt of court; fined 5 pounds and ordered committed until fine paid. Ms. Supreme Court Minutes, 1704-1715, November Term, 1705.

7. An entry at the March 1726 Term of the Supreme Court shows that it was a common practice for the court to proclaim that "all Persons be Silent till Charge Given, under Pain of Imprisonment." Id., 1716-1731, March Term, 1726.

D. *Failure of Jurors to Attend Court.*

1. Eight entries in the records of the Courts of Common Right and Chancery of East New Jersey for the period 1683-1702 reflect that 13 persons were fined for non-attendance as grand or petit jurors. Of the fines specified, one was for 5 pounds, six were for 40 shillings, two were for 20 shillings, and four were for 10 shillings. In October 1695 the court issued an order standardizing fines for juror non-attendance, both petty and grand, at 10 shillings. Journal of the Courts of Common Right and Chancery of East New Jersey, pp. 185, 223, 284-85, 310, 313. See also Edsall's Introduction at p. 50.

2. Nine entries in the records of the Court of Sessions and Pleas for West New Jersey for the period 1680-1709 show that a number of persons who failed

to appear, attend or serve as grand or petit jurors were fined in varying amounts from 5 to 20 shillings. Of the fines imposed, two entries were for 5 shillings each; three entries were for 10 shillings each; three entries were from 10 to 20 shillings; and one entry was for 20 shillings. The Burlington Court Book of West New Jersey, 1680-1709, pp. 9, 95, 98, 142, 154, 293, 299, 339-340. By a September 1682 court order fines on non-appearing jurors were to be at the discretion of the court not exceeding 2s., 6d. Id., p. 12.

3. Two persons, apparently petit jurors fined 10 shillings each for non-appearance and one fined 10 shillings "for refusing to take Attest in the Traverse Jury." Id., p. 182 (1695).

4. Four entries in the records of the Supreme Court for the period 1704-1715 show a number of non-attending grand and petit jurors fined from 6 shillings and 8 pence to 20 shillings each. Ms. Supreme Court Minutes, 1704-1715, May 1705, November 1711, and May and November 1712.

5. Three entries in the records of the Supreme Court for the period 1716-1731 show a number of grand jurors fined 13 shillings and 4 pence for non-attendance. Id., 1716-1731, May Term, 1718, November Term, 1718, and May Term, 1722.

6. Five entries in the records of the Supreme Court for the period 1731-1748 show a number of grand jurors or undesignated "jurors" fined between 10 and 40 shillings each for non-attendance. Id., 1731-1737, May Term, 1732, October Term, 1736, and November Term, 1737; id., 1738-1744, August 1741; id., 1744-1748, August 1744.

7. Twenty-nine entries in the records of the Supreme Court for the period 1749 to 1775 show a large number of persons who failed to appear or serve as grand or petit jurors fined in varying amounts from 13 shillings and four pence to 3 pounds. Of the fines imposed, one entry reflected a fine of 13 shillings and 4 pence; one entry was for a fine of 15 shillings; six entries were for fines of from 15 to 20 shillings; fourteen entries were for fines of 20 shillings; three entries were for fines from 20 to 40 shillings; two entries were for fines of 40 shillings; one entry was for 3 pounds; and one entry reflected an unspecified fine. Ms. Supreme Court Minutes, Vol. 51 (1748-1752), May 1749, March 1749, August 1751, August 1754; id., Vol. 52 (1752-1755), May 1752, March 1753, August 1753, March 1754, May 1754, August 1755; id., Vol. 53 (1755-1760), November 1755, March 1756; id., Vol. 10 (1760-1764), November 1761, September 1764; id., Vol. 11 (1761-1765), August 1761, November 1761, May 1762, August 1762, May 1764, August 1764; id., Vol. 54 (1765-1767), November 1766; id., Vol. 12 (1767-1768), November 1767; id., Vol. 57 (1768-1770), May 1770; id., Vol. 13 (1764-1772), September 1771, November 1771; id. Vol. 59 (1772-1775), September 1772, April 1773, May 1773.

8. Twenty-five entries in the records of the Supreme Court between 1776 and 1796 show that a large number of persons who failed to appear or serve as grand or petit jurors were fined in varying amounts from 20 shillings to 60 pounds. Of the fines imposed, ten entries were for amounts ranging from 20 shillings to 30 pounds (1776-1782); four entries were for three pounds each, but the fines were remitted in two cases (1785,

1786-1787, 1796); three entries were for fines from 3 to 5 pounds (1781-1782); two entries were for four pounds each (1781-1782); one entry was for fines between 5 and 15 pounds (1778); four entries were between 3 and 60 pounds (1780-1782), and one entry shows fines unspecified as to amount (1792). Ms. Supreme Court Minutes, Vol. 60 (1775-1782), April 1776, May 1777, November 1777, April 1778, November 1778, March 1779, September 1779, May 1780, September 1780, April 1781, November 1781, April 1782, May 1782; id., Vol. 14 (1782-1783), September 1782; id., Vol. 62 (1784-1785), April 1785, May 1785, September 1785; id., Vol. 63 (1787-1789), p. 152; id., Vol. 65 (1790-1792), September 1792; id., Vol. 21 (1796-1797), November 1796.

9. Eight "struck jurors" fined $10.00 each for non-attendance. Id., Vol. 21 (1796-1797), September 1797.

E. *Failure of Witnesses to Appear or Testify*

1. For failure of witness to obey summons and appear, fined 20 shillings. The Burlington Court Book of West New Jersey, 1680-1709, p. 26.

2. For crown witness sending in "pregmaticall answer by a Letter" and not apearing to subpoena; fined 5 pounds. Two other non-appearing crown witnesses fined 20 shillings each. Id., p. 182 (1695).

3. For witness refusing to be sworn when ordered by the court, fined 40 shillings. Ms. Supreme Court Minutes, 1704-1715, November Term, 1705.

4. For failure of witness for the crown to answer summons; attachment for contempt issued. Id., Vol. 53 (1755-1760), March Term, 1757.

5. For refusal by mother of unwed child to give evi-

dence to grand jury and court regarding the father of the child; ordered that she be committed to the custody of the sheriff of Burlington County "without Bail or Mainprize." Id., Vol. 10 (1760-1764), May Term, 1761.

6. For failure of witness to attend court and testify; attachment ordered to issue. Id., Vol. 61 (1782-1784), September Term, 1783.

7. For failure of witness to attend court and testify; ordered that Attorney General issue an attachment for contempt against the defendant. Id., Vol. 61 (1782-1784), November Term, 1783.

F. *Failure to Perform Official Duties*

1. For under-sheriff departing from court before jury agreed on a verdict; fined 40 shillings. Three jurors also departing were fined 5s. each. The Burlington Court Book of West New Jersey, 1680-1709 (Court of Sessions and Pleas) p. 9 (1681).

2. On September 26, 1682, the Court of Sessions and Pleas of West New Jersey entered an order that non-attendance at the court by justices should be dealt with by a fine not exceeding 5 shillings. Id., p. 12 (1682).

3. For non-attendance at court by several constables; fined 10 shillings each on several occasions. Id., pp. 98, 154, 301, 314.

4. For constable departing without leave of court; fined 12 shillings. Id., p. 301 (1705).

5. The Court of Sessions and Pleas of West New Jersey ordered that justices who failed to attend each quarterly court "shall pay for each court they appear not Three Shillings." Id., p. 156 (1683).

6. For failure of constable to attend court; fined 5

pounds. Ms. Supreme Court Minutes, 1704-1715, May Term, 1708.

7. For constable suffering a person to enter the jury box with jury during a murder trial; committed by court, but nothing further found in records. Id., 1738-1744, August Term, 1740.

8. For under-sheriff suffering a prisoner to go at large; fined 5 pounds for such contempt and ordered committed until the fine be paid. Id., 1738-1744, March Term, 1740-1741.

9. For constable suffering one of the jurors to drink without leave of court; ordered committed, and nothing further shown. Id., 1738-1744, May 1742.

10. For failure of sheriff to return panel of grand jurors; fined 13 shillings and 4 pence, but fine later remitted upon acknowledgment by sheriff and "promised amendment." Id., 1738-1744, November 1742.

11. Eleven entries appearing in the records of the Supreme Court from 1748-1775 show a large number of constables who failed to attend court fined in amounts ranging between 5 and 40 shillings. Of the fines imposed, one entry was for 5 shillings, three were for 10 shillings, three were for 10 to 20 shillings, one was for twenty shillings each, two were for 10 and 40 shillings, and one was for 40 shillings. Id., Vol. 51 (1748-1752), April 1749, May 1749, August 1749, August 1751; id., Vol. 52 (1752-1755), May 1752, August 1752, March 1754, August 1754; id., Vol. 53 (1755-1760), March 1756; id., Vol. 10 (1760-1764), November 1761; id., Vol. 11 (1761-1765), August 1761, November 1761, May 1762; id., Vol. 59 (1772-1775), September 1775.

12. For failure of sheriffs to attend court (two cases); attachments for contempt issued. Id., Vol. 53 (1755-1760), May Term, 1759; id., Vol. 10 (1760-1764), November Term, 1763.

13. For "Breach of Duty" by constable in allowing jurors to return to court without him; ordered committed. Id., Vol. 11 (1761-1765), March Term, 1762.

14. Twenty entries appearing in the records of the Supreme Court from 1776 to 1799 show a large number of constables who failed to attend court fined in amounts ranging from 15 shillings to 3 to 5 pounds, and later, from $8.00 to $10.00. Of the fines imposed, nine entries reflect that fines of 40 shillings for each constable for each day's absence were imposed from April 1778 to November 1780, that the fines were reduced to 15 shillings per constable per day from April 1781 to May 1782, and that the largest aggregate fine was 3 pounds and 15 shillings, in May 1781; two entries reflected fines of three pounds each (1788, 1790); one entry reflected fines from 3 pounds to 3 pounds and 15 shillings, but later remitted (1789); three entries showed fines from 3 to 5 pounds (1785); one entry showed fines from 1 pound and 10 shillings to 5 pounds (1786-1787); one entry was for 10 pounds (1780), but later remitted; one entry showed a fine of $10.00 while another showed a fine of $8.00 (1796 and 1794, respectively); and one entry was for an attachment for contempt (1786-1787). Id., Vol. 60 (1775-1782), April 1778, May 1779, November 1780, April 1781, May 1781, September 1781, November 1781, April 1782, May 1782; id., Vol. 63 (1786-1787), pp. 87, 150; id., Vol. 17 (1788-1789), September 1788; id., Vol. 65 (1790-1792), September 1790; id., Vol.

66 (1793-1795), April 1795; id., Vol. 21 (1796-1797), November 1796; id., Vol. 22 (1798-1799), February 1799.

15. For non-attendance at court by coroner; fined 100 pounds. Id., Vol. 60 (1775-1782), May Term, 1780.

16. For non-attendance at court by coroner; fined 15 shillings for each day's absence, total fine being 3 pounds and 15 shillings. Id., Vol. 61 (1782-1784), November Term, 1783.

17. For non-attendance at a court of Oyer and Terminer in August 1780 by persons apparently court officers; fined 50 pounds each, later remitted. Id., Vol. 62 (1784-1785), September 1785. The records also show that the court remitted 99 pounds of a 100 pound fine upon one Walter West, but no indication appears as to the basis for the fine. Id., April 1785.

18. For non-attendance by a justice of the peace and a coroner at the court of Oyer and Terminer for Hunterdon County; fines of 3 pounds each imposed, later remitted. Id., Vol. 66 (1793-1795), April Term, 1794.

19. For failure by several sheriffs to attend court; ordered that two sheriffs be fined $20.00 each, and that the Attorney General issue attachments for contempt against certain other sheriffs. Id., Vol. 22 (1798-1799), May 1798 and February 1799.

20. For failure of a justice to attend a court of Oyer and Terminer; fined $8.00, later remitted. Id., Vol. 22 (1798-1799), February 1799.

G. *Failure to Comply with Process.*

1. For refusal of constable to receive a warrant "for Destraining the Quaker fines for twenty shillings per

annum pursuant to the Militia Act"; fined 30 shillings. The Burlington Court Book of West New Jersey, 1680-1709, p. 314 (1706).

2. For failure of sheriff to make return of writ; amerced five pounds. Journal of the Courts of Common Right and Chancery of East New Jersey, 1683-1702, p. 202 (1685).

3. For failure of Clerk of Peace of Middlesex to make return of a writ of habeas corpus directed to justices of a Court of Sessions; amerced 20 shillings. Ibid.

4. For sheriff failing to make return of warrants of distress; ordered that sheriff be summoned to appear in court and "answer his contempt". Id., p. 313 (1698).

5. For failure of sheriff to attend court and make return of certain writs, fined 5 pounds. Ms. Supreme Court Minutes, 1704-1715, November Term, 1704.

6. For failure by city aldermen and constable to obey process of the court; ordered to show cause why attachment for contempt should not issue against them. Later, after a hearing, the court ordered that the "Rule be dismissed." Id., Vol. 54 (1765-1767), April Term, 1767, and id., Vol. 12 (1767-1768), April Term, 1767.

7. For resisting process of the court by the Earl of Sterling; attachment for contempt issued. Later, the recognizance of the Earl was ordered forfeited for his default in appearance at court, and process was ordered to issue thereupon. Id., Vol. 59 (1772-1775), September 1775 and id., Vol. 60 (1775-1782), November Term, 1775.

8. For attorney's refusal to attend court pursuant to a summons so to do for the purpose of answering a charge that he had falsely issued a writ to a condemned

murder; ordered that the attorney be disbarred. Id., Vol. 63 (1786-1787), p. 87, April 1786.

9. On certiorari, the court ordered a lower court justice to state certain particulars about a case or else show cause why an attachment should not issue against him for contempt. Id., Vol. 21 (1796-1797), April Term, 1796.

10. For failing to comply with a writ of habeas corpus; court ordered defendant to comply or else show cause why he should not be attached for contempt. Id., Vol. 22 (1798-1799), April and May, 1798.

H. *Failure to Obey Court Rules or Orders*

1. For sheriff bringing prisoner into court without irons, contrary to court order; fined 5 pounds. The Burlington Court Book of West New Jersey, 1680-1709, p. 55 (1686).

2. For refusal by clerk of Supreme Court to obey court order regarding the administration of an affirmation to jurors who were Quakers; ordered that clerk appoint another to act in his stead, be fined 20 pounds for his contempt of court, and stand committed until the fine was paid. Ms. Supreme Court Minutes, 1704-1715, November Term, 1715. Later, for the former clerk's conduct in obtaining an indictment against the Chief Justice, the court ordered him disbarred from all courts in the province. Id., 1716-1731, May Term, 1716.

3. For failure of clerks of various lower courts to deliver their accounts pursuant to court orders; ordered to show cause why attachments for contempt should not issue. Id., Vol. 53 (1755-1760), August Term, 1759.

4. Supreme Court ordered that all persons having seals of the court deliver them to the Chief Justice or else show cause why attachments should not issue against them for contempt. Id., Vol. 11 (1761-1765), May Term, 1762.

5. Upon disobedience by clerk of county court to a court order to deliver records to the Supreme Court; clerk disbarred and fined 20 pounds. Id., Vol. 62 (1784-1785), April and September Terms, 1785.

NEW YORK

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I. Judicial Establishment

From 1665 to 1683, a period of proprietary rule, the Court of Assizes was the principal court of original and appellate jurisdiction in the province. In November, 1683, the first Assembly erected a court of Oyer and Terminer having general common law jurisdiction; the Court of Assizes was dissolved by an act of October 1684. In 1691 by act of Assembly an entirely new judicial establishment was provided for the province. A Supreme Court of Judicature was erected with cognizance of all pleas—civil, criminal and mixed—as fully to all intents as the Courts of King's Bench, Common Pleas and Exchequer in England. It was also given supervisory jurisdiction, comparable to that of King's

Bench in England, over the inferior law courts of the province—Inferior Courts of Common Pleas and General Sessions of the Peace in each county. The Governor and Council constituted a Court of Errors for the province. The Supreme Court, by virtue of various acts and ordinances, continued as the principal court of original jurisdiction, civil and criminal, during the colonial period and into the post-Revolutionary period. In 1784 a Court for the Trial of Impeachments and the Correction of Errors was established—a substitute for the appellate jurisdiction formerly exercised by the Governor and Council. The research included the extant records of the Court of Assizes, the Supreme Court and the Governor and Council.

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. The 1683 "Charter of Libertyes and priviledges granted by his Royall Highnesse to the Inhabitants of New Yorke and its Dependencyes" (actually not a charter from the Duke of York, but merely an act of the General Assembly, repealed or disallowed by the King, March 3, 1683-84) provided in the language of Magna Carta, c. 20, that no amercements should be assessed but by the oath of twelve honest and lawful men of the vicinage and then added "provided the faults and misdemeanours be not in contempt of Courts of Judicature." Colonial Laws of New York, Vol. 1, p. 113 (1894). Substantially the same provision was contained in a May 13, 1691 act (An Act declareing what are the Rights and Priviledges of their Majesties Sub-

jects inhabiting within their Province of New York). Id., p. 247. This act was apparently disallowed by the King in Council on May 11, 1697 (Id., p. 244), and is so designated in some later collected laws, but it appears in Bradford, Acts of Assembly passed in the Province of New York, from 1691 to 1725, pp. 2-5 (1726).

B. *Defamation or Abuse of Court or Court Officials*

1. The so-called Duke of York's Laws, promulgated on March 1, 1664-65, provided that, "Whosoever shall speak in Derogation of the Sentence or Judgment of any Court, shall be fined at the Discretion of the next Court of Sessions or Assizes," the warrant to be issued by the clerk. Colonial Laws of New York, Vol. 1, p. 28 (1894). This provision probably did not continue in effect beyond 1691. See Historical Note by R. C. Cumming at p. xii in Colonial Laws of New York, Vol. 1.

C. *Misconduct in Presence of Court*

1. The Duke of York's Laws, promulgated on March 1, 1664-65, provided as to holding the Court of Sessions that the cryer or sheriff was to make proclamation in a certain form, such form reading *inter alia*, "Silence is Commanded in the Court whilest his Majesties Governor Counsel and Justices are Sitting upon pain of Imprisonment." Colonial Laws of New York, Vol. 1, p. 28 (1894). This provision presumably did not continue in effect beyond 1691. See Historical Note by R. C. Cumming, *supra*.

D. *Failure of Jurors to Attend Court*

1. An addition to the Duke of York's Laws (presumably made in 1665) provided that any person nomi-

nated to serve on a jury who refused to serve without just cause was to forfeit 20 shillings to be levied by the constable. Colonial Laws of New York, Vol. I, pp. 73, 80 (1894). This provision was probably no longer in effect by 1691, judging by the amounts of the fines imposed by the Supreme Court, *infra*.

2. A May 16, 1699 act (A bill for ye Regulating and returning of able and Sufficient Jurors in Tryalls at Law), extending to substantially all the courts in the colony, provided that every juror returned and impanelled making default was to forfeit the sum of 13 shillings and 4 pence current money, to be levyed and recovered by the sheriff or his deputy in such manner and ways as issues of jurors were formerly levied. Id., Vol. 1, pp. 387-88. The act was continued by acts of 1710 (id., Vol. 1, p. 708); 1719 (id., Vol. 1, p. 1021), and 1726 (id., Vol. 2, p. 345).

3. A 1741 Act (an Act for the Returning of Able and Sufficient Jurors, and for the better Regulation of Juries) provided that every person whose name was drawn as a juror and who did not appear after being openly called three times, upon oath made by some credible person that such person so making default had been lawfully summoned, should forfeit and pay for every such default (unless reasonable cause was shown) such fine not exceeding 3 pounds and not less than 13 shillings, 4 pence, as the court should think reasonable to inflict or assess. Id., Vol. 3, p. 190. This act was made perpetual by a 1746 act. Id., Vol. 3, p. 599; Van Schaack, Laws of New-York, From the Year 1691, to 1773 inclusive, Vol. 1, pp. 216, 272 (1774).

4. A 1769 act empowering justices of the peace,

mayors, recorders and aldermen to try causes to the value of ten pounds contained a similar provision for defaults of jurors except that the fine was not to exceed 20 shillings nor be less than 5 shillings. Id., Vol. 4, p. 1083. This act was disallowed by the King in Council, Dec. 9, 1770.

5. A 1772 act empowered justices of the peace, etc., to try causes to the value of 5 pounds contained substantially the same clause as to defaulting jurors, except that the maximum was 40 shillings and the minimum 10 shillings. Id., Vol. 5, p. 309. By its terms (Section XVI) this act was to continue in force until Feb. 1, 1780.

6. An act of February 6, 1768, provided that whenever a fine should be imposed upon any grand or petit juror, constable or other person whose duty it was to attend the courts for their default or non-attendance, the sheriff who summoned them or the officer who returned the panel, should according to the order of the court distrain the goods and chattels of the defaulter, and sell the same at public vendue, and retain part of the produce of the same, a sum equal to the fine, with so much besides as would be sufficient to pay him a specified fee. These provisions, to expire on January 1, 1770, were not to extend to any fine above 10 pounds "or to any Court for the Trial of Causes to the Value of Five Pounds and under." Colonial Laws of New York, Vol. 4, p. 1000. This statute was re-enacted on January 27, 1770, and April 3, 1775. Id., Vol. 5, pp. 67, 875.

7. A 1785 act (An act to punish delinquent jurors, constables and other persons), after reciting that a

defect of sufficient power in the several courts of record in imposing fines for the defaults of jurors, constables and other persons occasioned remissness in their attendance to the delay of justice, provided that every grand or petit juror, constable or other person whose duty it was to attend any courts of record who refused or neglected to attend should be liable to be fined by the court in a sum not exceeding 5 pounds. Public proclamation of such fines was to be made; they were to be levied by the sheriff by distress (substantially in the manner provided by the Feb. 6, 1768 act, *supra*); the act was not to extend to courts for the trial of causes of 10 pounds and under. Laws of the State of New York passed at the Sessions of the Legislature held in the years 1785-1788, inclusive, p. 49 (1886).

8. A 1786 act (An act for regulating trials of issues, and for returning able and sufficient jurors) raised the fine to 10 pounds, such fines to be estreated into the Court of Exchequer. Id., p. 278. Apparently no further act with respect to defaulting jurors was passed until 1803. Laws of the State of New York, Vol. 1, pp. 375, 381 (1802-1804).

9. A 1790 act provided that in all cases where any fine upon any juror or any officer of any court for any default of attendance at any court was estreated into the Court of Exchequer and a petition for relief was presented, it should be lawful for the court to hear and determine all matters concerning the same and upon good and sufficient cause shown to remit any such fine or fines or any part thereof according to equity and justice in the same manner as in the case of estreated recognizances. Laws of the State of New York passed

at the Sessions of the Legislature held in the years 1789-1796, inclusive, p. 194 (1887).

E. *Failure to Assist Court Officers*

1. The Duke of York's Laws provided sub Constables as follows:

"And if any person shall refuse to Assist any Constable in the Execution of his Office * * * They shall pay for neglect thereof ten Shillings to the use of the Town of which he is Constable To be Levyed by warrant from any Justice before whom such Offender shall be brought And if it appears by good Testimony that any shall wilfully or Contemptuously refuse or neglect to assist any Constable as is before expressed, he shall pay to the use aforesaid forty Shillings." Colonial Laws of New York, Vol. 1, p. 29 (1894). This provision probably did not continue beyond 1691. See Historical Note by R. C. Cumming, *supra*.

F. *Refusal to Serve as Court Officers*

1. A 1665 addition to the Duke of York's Laws provided that any person duly elected who refused to serve in the office of constable was to forfeit 5 pounds. Colonial Laws of New York, Vol. 1, p. 79 (1894). This 5 pounds forfeiture was continued by an October 22, 1684 act. Id., pp. 146-47. Whether this act continued in force beyond 1691 is problematical. See R. L. Fowler, Facsimile of the Laws and Acts of the General Assembly for their Majesties Province of New-York, Introduction, pp. lxxvii-lxxxiii (1894).

2. A 1715 act provided that any person within the City of New York chosen a constable who refused to

execute the office was to pay as a fine 15 pounds current money. Colonial Laws of New York, Vol. 1, p. 878. Van Schaack, Laws of New-York from the Year 1691 to 1773, inclusive, Vol. 1, p. 102 (1774).

3. A 1768 act for choosing constables in King's, Queen's and Richmond Counties provided for a 5 pound forfeiture, with costs, to be recovered by distraint, in the event of refusal or neglect to serve as constable. Colonial Laws of New York, Vol. 4, p. 977.

4. A 1771 act for electing constables in certain townships provided a 40 shillings forfeiture for refusal or neglect to serve. Id., Vol. 5, p. 148. By an act of Oct. 1, 1779, which expired Sept. 1, 1782, the amount of such forfeiture was increased to 50 pounds to be recovered before a justice of the peace by the overseers of the poor. Laws of the State of New York passed at the Sessions of the Legislature held in the years 1777-1784, inclusive, pp. 150-51 (1886).

5. A 1772 act enabling the inhabitants of the County of Charlotte to choose constables *inter alia* imposed a 4 pounds penalty on any person neglecting or refusing to serve as constable, to be recovered with costs of suit by plaint, bill or information in the Superior Court of Common Pleas in the name of the Clerk of the Peace. Colonial Laws of New York, Vol. 5, p. 413. The same provisions were made applicable to the County of Cumberland. Id. p. 405.

G. *Failure to Perform Official Duties*

1. A 1665 addition to the Duke of York's Laws provided that any justice of the peace or high constable who was absent from the sessions in his riding or from

the General Court of Assizes was to pay 10 pounds for every day's absence and every constable for each default 5 pounds. Colonial Laws of New York, Vol. 1, p. 73-74 (1894). An act passed October 24, 1684, provided that if any justice of the peace was absent from the sessions held in his county or from the Court of Oyer and Terminer and General Goal Delivery, so that such court or courts could not proceed for want of a quorum, he was to be fined 5 pounds for every day's absence unless hindered by an act of God. Id., pp. 156-57. Whether this act continued in force beyond 1691 is problematical. See Fowler, Introduction, *supra* p. 216.

H. *Failure to Comply with Process*

1. From a 1775 act it appears that process of contempt in the Chancery Court consisted of attachment, attachment with proclamation and commission of rebellion. Id., Vol. 5, p. 787.

2. A 1787 act provided that when the sheriff or any deputy found resistance made against any process of execution, he was to certify to the court the names of the resisters, aiders, etc. and they were to be attached by their bodies to appear; if convicted of such resistance, they were to be punished by fine and imprisonment. Laws of the State of New York passed at the Sessions of the Legislature held in the Years 1785-1788, inclusive, p. 409.

3. A 1787 act provided that every officer refusing to obey a writ of habeas corpus was to forfeit to the prisoner or party grieved for the first offense 100 pounds and for the second 200 pounds (and to be incapable of holding office) to be recovered by action of

debt, etc. in any court of record. Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1785-1788, inclusive, pp. 427-28.

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court*

1. A number of entries in the records of the Supreme Court for the 1701-1704 period show that for non-appearance petit jurors and grand jurors were usually amerced or fined 13 shillings, 4 pence. Hamlin and Baker, *Supreme Court of Judicature of the Province of New York, 1691-1704,* Vol. 2, pp. 72, 147, 169, 181 (13 petit jurors), 193 (7 grand jurors), 211 (7 grand jurors), 231 (6 grand jurors), 233, 241. In several cases the entry specifically stated that the amercements were to be levied on the defaulter's goods and chattels. In a few instances defaulting petty jurors were amerced only 6 shillings, 9 pence. Id. 213, 215.

2. During the 1704/5 - 1709/10 period some 27 petit jurors were fined 13 shillings, 4 pence for non-attendance at the Supreme Court; 8 were fined £ 1/6/8 (double the normal fine). Ms. Supreme Court Mins., 1704/5 - 1709/10, pp. 6, 108, 133, 156, 195, 214 (Hall of Records, New York County, New York, N. Y.). In the 1710-1714 period 3 grand jurors and 2 petit jurors were fined 13 shillings, 4 pence for non-attendance. Id., 1710-1714, p. 306. In the 1723-1727 period 2 grand jurors and 3 petit jurors were fined in the same amount. Id., 1723-1727, pp. 18, 97.

3. The Supreme Court circuit minutes for 1721-1749 show 15 petit jurors and 2 grand jurors fined 13 shil-

lings, 4 pence for non-attendance. Ms. Minutes of the Circuit, 1721-1749, sub Dec. 13, 1726, June 27, 1728 and July 13, 1748 (Library of the Association of the Bar of the City of New York).

4. In the Supreme Court minutes for 1754-1757 one grand juror was fined 3 pounds for non-attendance. Ms. Supreme Court Mins., 1754-1757, p. 73. In the 1757-60 period an unspecified number were fined 40 shillings each for non-attendance. Id., 1754-1757, pp. 57-58.

5. In the period 1762-1764 18 petit jurors were fined 13 shillings, 4 pence for non-attendance at the Supreme Court. Ms. Supreme Court Mins., 1762-1764, pp. 273-74. In the period 1766-1769 38 petit jurors were fined 13 shillings, 4 pence each for non-attendance and 2 petit jurors and 5 grand jurors were fined 3 pounds each. Id., 1766-1769, pp. 384, 547, 606. In the 1769-1772 period 117 petit jurors were fined from 6 shillings, 8 pence to 13 shillings, 4 pence each for non-attendance, at least 70 other petit jurors were fined in amounts not set forth in the minutes. Id., 1769-1772, pp. 12, 18, 19, 21, 22, 177, 180-81, 185, 186, 188, 195, 196. In the 1772-1776 period 22 petit jurors were fined 13 shillings, 4 pence for non-attendance. Id., 1772-1776, p. 112.

6. Entries in the records of the Supreme Court from January 18, 1785 to October 28, 1786 show that 73 grand jurors and 41 petit jurors were fined in varying amounts for their non-attendance at court. Of the fines imposed, 17 grand jurors were fined from 3 to 4 pounds, 38 from 2 to 3 pounds, and 18, 30 shillings each; 41 petit jurors were fined 13 shillings, 4 pence. Ms. Supreme Court Mins., 18 Jan. 1785 - 5 Nov. 1785, pp. 1, 3 (Oct. Term);

id., 17 Jan. 1786 - 6 May 1786, pp. 1, 14, 25, 49; id., 25 July 1786 - 28 Oct. 1786, p. 1 (July Term).

7. For non-attendance at court by 12 grand jurors and 24 petit jurors; grand jurors fined 30 shillings each, and petit jurors fined 13 shillings and 4 pence each. Id., 15 Jan. 1788 - 1 Nov. 1788, pp. 78, 80, 99 (July Term) and 133 (Oct. Term).

8. Entries appearing in the records of the Supreme Court from July 1790 to November 1794 show that 56 grand jurors and 151 petit jurors were fined in varying amounts for their non-attendance at court. Of the fines imposed, two were for 9 pounds (1790), twenty-five were from 3 to 5 pounds, (1792-1794), four were for 4 pounds (1791), nine were for 3 pounds (1790), thirty were for 40 shillings (1791-1792), forty were from 24 to 30 shillings (1794), sixty-two were for 20 shillings (1791-1792), and 35 were from 10 to 20 shillings (1791-1792). Id., 7 July 1790-6 Nov. 1790), pp. 2, 31 (Oct. Term); id., 1791-1792, pp. 36, 52 (Jan. Term 1792), and pp. 130, 133, 255, 265, 339; id., p. 1 (July Term 1792), p. 2 (Oct. Term 1792) p. 12 (Jan. Term 1793), and pp. 2, 27 (Apr. Term 1793); id., 2 Jan. 1794-8 Nov. 1794, pp. 186, 203, 452, 585, 624.

9. Entries appearing in the records of the Supreme Court from 1795 to 1800 show that 94 grand jurors and 32 petit jurors received fines in varying amounts for their non-attendance at court. Of the fines imposed, eleven were for 5 pounds (1797-1800), 27 were for 3 pounds (1795-1800), two were for $20.00 (1797-1800), four were for $10.00 (1797-1800), seven were for $8.00, seven were for $5.00 (1797-1800), fifty-seven were for 40 shillings (1795-1796), and eleven were for 20 shil-

lings (1797-1800). Id., 20 Jan. 1795-7 Nov. 1795, pp. 401, 605, 688; id., 19 Jan. 1796-6 Nov. 1796, pp. 128, 140, 145, 156, 278, 401; id., 1797-1800 (Engrossed), pp. 2, 7, 17, 86, 119, 131, and entries of July 26, 1797, and July 31, 1798.

B. *Failure to Perform Official Duties*

1. For non-attendance of 31 constables and of 5 deputy sheriffs; the 5 deputy sheriffs were fined 5 pounds each and the constables 3 pounds each. Ms. Supreme Court Mins., 18 June 1785-5 Nov. 1785, pp. 1, 3.

2. For non-attendance at court by an unspecified number of constables; some were fined 30 shillings each and nine 20 shillings each. Id., 19 Jan. 1790-8 May 1790, pp. 64 and 156 (April Term) and 107 (January Term).

3. For non-attendance at court by 42 constables; each fined 20 shillings. Id., 1791-1792, pp. 279 (1791) and 18 (Jan. Term 1792).

4. For non-attendance at court; sheriff fined in unspecified amount (1796), four constables fined 40 shillings (1796) and ten constables fined 20 shillings (1794-1795). Id., 2 Jan. 1794-8 Nov. 1794, p. 29; id., 20 Jan. 1795-7 Nov 1795, p. 308; id., 19 Jan. 1796-6 Nov. 1796, p. 383 and May 4, 1796 entry.

5. For non-attendance at court by 11 constables, each constable fined $3.00. Id., 1797-1800 (Engrossed), pp. 68, 119.

IV. Extension of Laws of England to Province

1. A 1691 act (An Act for the Establishing Courts of Judicature for the Ease and Benefit of Each Respec-

tive City, Town and County within this Province) established a Supreme Court of Judicature which was "fully Impowered and Authorized to have Cognizance, of all pleas, Civill, Criminall, and Mixt, as fully and amply to all Intents and purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, and Exchequer within their Majestyes Kingdome of England, have or ought to have." Colonial Laws of New York, Vol. 1, p. 226. This same authority was continued in the Supreme Court during the colonial period by several acts of Assembly and ordinances of the Governor and Council (see id. Vol. 1, pp. 303, 359, 380; Laws of the State of New York (Rev. Van Ness and Woodworth, 1813), Vol. 1, p. 318, note; Vol. 2, Appendix, x-xiii; Documents Relating to the Colonial History of New York, Vol. 5, p. 952; 1 E. D. Smith, Rep. Cases Court of Common Pleas, Introduction, l-lii).

2. In the famous trial of Colonel Nicholas Bayard, reported in 14 Howell's State Trials at p. 471, references to the law of England as controlling on the procedures in the Supreme Court appear at pp. 478, 479, 480, 495, 498-99, 500-01, 505, 506, 507, 513-15.

3. The earliest complete commission extant to a justice of the Supreme Court, that to Lewis Morris in 1715, granted "full power and Lawful Authority to heare try and determine all Pleas whatsoever Civill criminall and mixt According to the Laws, Statutes and customes of England and the Laws and usages of our said Province of New York not being repugnant thereto and Execution of all Judgments of the said court to Award and make such rules and orders in the said court as may be found convenient and useful and as neare as may be

Agreeable to the Rules and orders of our Courts of Kings bench common Pleas and Exchequer in England." Goebel and Naughton, *Law Enforcement in Colonial New York,* p. 48, note 227 (1944).

4. The later form of commission to Supreme Court justices, presumably reflecting the controversy in *King* v. *Zenger* (1735), contained additional language, granting "full Power and Authority in our Said Supreme Court to hear try and determine all Pleas whatsoever Civil Criminal and mixed according to the Laws Statutes and Customes of that Part of our Kingdom of Great Britain called England and the Laws of our said Province of New York not being repugnant thereto and Execution of all Judgments of our said Court to award and to act and do all Things which any of our Justices of either Bench or Barons of the Exchequer in that part of our Kingdom of Great Britain called England may or ought to do And to make such Rules and Orders in our said Court as shall be judged convenient and useful and as near as may be agreeable to the Rules and Orders of our Courts of Kings Bench Common Pleas and Exchequer in that part of our Kingdom of Great Britain called England." Goebel and Naughton, *op. cit. supra,* pp. 48-49, note 228.

5. In the famous case of *Forsey* v. *Cunningham* (1764), involving the scope of appellate review by the Governor and Council of judgments of the Supreme Court rendered on jury verdicts, Chief Justice Horsmanden commented that: "The Supreme Court here proceeds in the Main, according to the Practice of the Courts at Westminster; and the Common Law of England, with the Statutes affirming, or altering it, before

a Legislature was established here, and those framed since such Establishment, expressly extended to us, with our legislative Acts (which are not to be repugnant to the Laws of England) constitute the Laws of this Colony." The Report of an Action of Assault, Battery and Wounding, Tried in the Supreme Court of Judicature for the Province of New York, in the term of October 1764, Between Thomas Forsey, Plaintiff, and Waddel Cunningham, Defendant, p. 9 (1764). In the same case William Smith, commenting upon his commission as justice in the Supreme Court (his commission being substantially in the form of the commission quoted from in paragraph 4 supra), was reported as stating "that he was constituted a Justice of the Supreme Court, and that the Power and Authority granted to him, was to hear, try and determine, according to the Laws, Statutes, and Customs of that Part of the Kingdom of Great Britain called England; it was plainly a Law Commission, and that he was only authorized and empowered to award Executions of all Judgments of the said Court, and to act and do, all things which any of his Majesty's Justices of either Bench, or Barons of the Exchequer, in that Part of the Kingdom of Great Britain called England, might or ought to do; and to make such Rules and Orders in the said Court, as should be judged Convenient and Useful; and as near as might be, agreeable to the Rules and Orders of the Courts of King's Bench, Common Pleas and Exchequer in England." Id., p. 18.

6. In the *Forsey* v. *Cunningham* controversy the Council of the province, in answering a contention of Lieutenant Governor Colden "That tho' the Colonies

are intitled to the Antient common Law of England, as it stood before the Time of the great Charter, yet none of the Laws which took Place since that important Aera do extend to the Colonies," stated (ibid., p. 37):

> "1st. That it has been solemnly adjudged before the King in Council, that in all Colonies the Subjects carry with them the Laws of *England*, and therefore as well those that took Place after, as those which were in Force before the passing of the great Charter.
>
> "2dly. That by the Statute of 7 & 8, W. III. the Laws of *England*, as they then were, and as they should appear to be thereafter, are made the Standards of Law in the Colonies; as,
>
> "3dly. They are also by one of his present Majesty's Instructions, in which the Governor or Commander in Chief is directed 'to take Care that no Man's Life, Members, Freehold, of Goods, be taken away or harmed, otherwise than by established and known Laws, not repugnant to, but as much as may be, agreeable to the Laws of England,' pursuant to which Adjudication, Statute, and Instruction,
>
> "4thly. The Laws of *England* in themselves, and in the Manner of administering them, have been the Measure of Right and Wrong between Subject and Subject in this Colony, from its first Settlement, down to the present Day; and will doubtless be maintained as such, agreeable to the Coronation Oath established by the Statute of the 1 W. and M. Statute 1, Chap. 6, Sec. 2, according to which, the King swears to govern the People of *England, and the Dominions thereunto belonging* according to the Statutes in Parliament agreed on, and the Laws and Customs of the same."

As part of its summation the Council advanced the following (ibid., pp. 56-57):

". . . 1st. That omitting the Defects contained in the Instruments under Seal, by which an Appeal is sought in the present Case, an Appeal from the Verdict of a Jury, taking the Word in any Sense, is not known in the Law of *England*, it having been the established and continual Practice, from Time immemorial, to try and determine all Facts by Juries.

"2dly. That the Statute of the 7 and 8 W. III. has erected the Laws of *England*, which were in Force at the Time of the Settlement of this Colony, as the Standard of Law in the Colony. 3dly. That his Majesty's Instruction, in which the Governor or Commander in Chief is directed to take Care, that no Man's Life, Members, Freehold, or Goods be taken away, or harmed, otherwise than by established and known Laws, not repugnant to, but as much as may be, agreeable to the Laws of *England*, (which is similar to every Instruction hitherto known to us, that has been issued on that Subject since the passing of that Statute) is supported by the aforesaid Statute, and is calculated to enforce an Obedience to it.

"4thly. That in Consequence of the aforesaid Statute and Instructions, not only the Laws of the Colony, but the Practice of it's Courts, have always been in the strictest possible Conformity to the Laws of *England*, and the practice of the King's Courts there.

"5thly. That an Extention of the Laws of *England*, and the Practice of the King's Courts there, as transferred to this Colony by the said Statute, and enforced by the aforesaid Instruction, has been

further enforced by solemn Adjudication before the King in privy Council.

"6thly. That the Terms of his Majesty's 32d Instruction, have a necessary Reference to such Appeals as were known to the Law of *England*, and had been long used in this Colony; and that no other Appeals than in Cases of Error in Law (which are the only Cases of Appeal provided for in former Instructions) have, until the present Instance, ever been brought here."

7. The only rule of the Supreme Court found relating to contempt provided that if any sheriff, undersheriff, bailiff or deputy wilfully delayed the execution or return of any process or execution, or took or required "undue fees", or notified a defendant so as to frustrate execution of any process or writ, or improperly detained money coming into their hands, "the contempt or misdemeanor appearing, an attachment, information, committment, or fine to be as the case requireth." Hamlin and Baker, *op. cit. supra,* Vol. 1, p. 376 (Rule 4).

8. Article 35 of the Constitution of the State of New York (April 20, 1777) provided in part:

"And this convention does further, in the name and by the authority of the good people of the state, ORDAIN, DETERMINE AND DECLARE, That such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, shall be and continue the law of this state; subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the

same." 1 Laws of the State of New York, p. 15 (Kent-Radcliff Rev., 1802).

V. Contempt Cases Arising Under Common Law or Usage

1. For an unspecified contempt of court; offender fined. Ms. Mins. Court of Assizes, 1665-1672, p. 192 (New York State Library, Albany, N.Y.).

2. For juror attending court while intoxicated; offender committed to prison (Id., p. 263).

3. At an October, 1691, court three jurors lost their issues. Hamlin and Baker, Supreme Court of Judicature of the Province of New York, 1691-1704, Vol. 2, p. 7 (1952).

4. For non-attendance by 18 petit jurors; each fined 13 shillings and 4 pence. Minutes of the Supreme Court of Judicature, 1693-1701, pp. 44, 66, 77, 79, 135, 153, 174, 193, 197 (The New-York Historical Society Coll., 1912).

5. For non-attendance of an unspecified number of grand and petit jurors; some fined one mark each, other grand jurors fined 13 shillings, 4 pence each. Id., pp. 144-145, 174, 200.

6. For non-attendance by 4 persons at a coroner's inquest; each fined in unspecified sum. Id., p. 134.

7. For non-attendance at court by an unspecified number of constables; each fined 20 shillings. Id., pp. 144-145.

8. Simon Smith, the Governor's chaplain, for having uttered "severall scurrilous expressions to the scandall of his function the abuse of the Grand Jurors and [diminution] to the dignity of the Court", it was recom-

mended that the Lieutenant Governor take appropriate steps. Id., pp. 173-74.

9. Constables failing to attend the court in the 1701-1704 period were in one case amerced 10 shillings; in another instance, 6 shillings, 8 pence; in a third case 12 shillings for 2 days absence; in a fourth "three pieces of eight for not attending this terme [Sept. 1704] and six shillings and nine pence a day for each defaltment per diem for this Terme." Hamlin and Baker, Supreme Court of Judicature of the Province of New York, 1691-1704, Vol. 2, pp. 67, 166, 219, 226, 234 (1952).

10. In King v. Nicholas Bayard, the famous treason trial at a Special Court of Oyer and Terminer, on March 7, 1701/2, the court, "Ordered the defaulters of the Petit Jurys be amerced ten pound each if they appear not this afternoon or show reasonable cause why they did not appear." Two were so amerced as "willfull defaulters." Id., p. 82. In the companion case, King v. John Hutchins, the court ordered a 5 pound fine for those of the petty jury not appearing on March 27, 1702. Id., 88-89.

11. In April 1702 a grand jury of the Supreme Court presented Sampson Broughton, the Attorney General of the province, for "high Misdemeanors in neglecting his Duty of Attorney Generall" in the Bayard and Hutchins prosecutions and prayed the court would put it in form. Although the Attorney General declared "The Court here has no authority over him unless he affront the Court he is answerable to none but the King and Governor for any neglect of his office," the court ordered the Solicitor General, who had handled the above prosecutions, to put the presentment in form.

Id., pp. 82, 88, 98. However, four days later Broughton submitted to Lieutenant-Governor Nanfan and the Council acknowledging his neglect of duty" and was "pardoned." Id., pp. 352-53.

12. In several instances in the 1703-1704 terms sheriffs and coroners were threatened with amercements for failure to make return of process, such amercement being 20 shillings in one case and 40 shillings in another. Id., pp. 110, 111, 150, 215, 231.

13. In 1703 Johannes Tiebout was presented by a grand jury for a misdemeanor in refusing to assist a constable in the execution of his office, tried and convicted. Id., pp. 133, 154, 173, 175, 177.

14. In the period 1704/5-1709/10 7 non-attending grand jurors were fined from 20 shillings to 25 shillings, 8 pence each. Ms. Supreme Court Mins., 1704/5-1709/10, pp. 15, 18, 108.

15. In the early 1730's a constable was fined 30 shillings for non-attendance. Id., 1732/3-1739, p. 31.

16. In the course of the preliminaries in King v. Zenger, James Alexander and William Smith, counsel for the defendant, were excluded from the bar for excepting to the commissions of Chief Justice De Lancey and Justice Phillipse. Id., 1732/3-1739, p. 156; Goebel and Naughton, op. cit. supra, pp. 49-50.

17. A Supreme Court petit juror was fined 5 pounds for withdrawing without leave of the court after having been sworn. Ms. Court for Tryall of Causes, 1721-1749, sub August 20, 1723. The members of a petit jury were fined 20 shillings each for separating without agreeing on a verdict. Id., sub Sept. 4, 1733. Five jurors were fined 20 shillings each for having left the bar, as was

the attending constable. Id., sub Sept. 11, 1733. A petit juror and a constable were each fined 40 shillings for leaving the court without permission. Id., sub March 23, 1735/6.

18. Robert Williams was committed for striking the sheriff "at the Door of the Court during the Sitting of the Court." Id., sub March 23, 1735/6.

19. Robert Kidney was fined 5 pounds for "his Disorderly behavior in the face of the Court and ordered that he stand committed till he Pay his fine," the fine being remitted upon "submission for his Impudence." Id., sub June 13, 1749.

20. In the period 1754-1757 4 grand jurors were fined 5 pounds each for non-attendance. Ms. Supreme Court Mins., 1754-1757, p. 73.

21. John Martin, refusing to give evidence for the crown was fined 10 pounds and ordered committed until he paid. Ms. Supreme Court Mins., 1762-1764, p. 171.

22. In some prosecutions in October, 1763 for trading with the enemy Theunis Thew, William Dobbs and William Paulding were each fined 200 pounds for refusing to testify for the crown, pardons having been offered to Thew and Paulding. Id., 1762-1764, pp. 273, 274, 290, 297. See also Goebel and Naughton, op. cit. supra, p. 243.

23. In 1764 the grand jury representing to the Supreme Court that John Lasker and others had refused to take an oath to give evidence, the sheriff was ordered to take the recalcitrants into custody. Ms. Supreme Court Mins., 1764-1767 (Rough), p. 23. On October 27, 1767 Joseph Hildreth who had been subpoenaed as a witness but did not appear was brought into court, fined

20 shillings and ordered committed until it was paid. Id., p. 279. In the case of the murder of Elizabeth Kaits two witnesses who refused to attend the grand jury were ordered to be brought in to answer their contempt and then put under recognizance. Ms. Supreme Court Mins., 1766-1769, pp. 317, 319. See also the comment of Goebel and Noughton that:

> "The treatment of defaults and refusal to testify in criminal cases as contempts appears to us to have been another contribution of John Tabor Kempe. This must have been something of an innovation for in Kempe's brief in the case of *King* v. *Lawrence* (the case involving the carting of George Spencer) is the marginal note 'Attachment lyes for refusing to appear and give evidence' (citing 2 Lilly 449 and Stiles, *Practical Register* 672), suggesting that this rule, long established in England, was something of a novelty in the Province. In any event, it is worthy of remark that after 1760 there are a number of cases where the Supreme Court dealt sharply with reluctant witnesses who ignored process or who on appearance declined to give evidence. There are no surviving examples of writs of attachment, but the minute entries of orders to take the persons into custody, or a notice that a constable had 'brought in' a defaulting witness, are probably to be taken as executed by writ. Once present, the court either imposed a fine with imprisonment until paid or put the witness in contempt under recognizance. Of course if the witness were already under recognizance this could be ordered forfeit."

24. George Clock, attached for his contempt in rescuing his father, was discharged upon finding that he had been indicted, tried and fined 10 pounds by the

Court of General Sessions for Albany. Ms. Supreme Court Mins., 1766-1769, p. 504.

25. Jonathan Wright was committed to the custody of the sheriff until he paid costs taxed against him. Id., 1766-1769, p. 506.

26. In the period 1769-1772, 20 constables were fined 6 to 10 shillings and an unspecified number 40 shillings for non-attendance at the Supreme Court. Four non-attending grand jurors were fined 10 pounds each. Id., 1769-1772, pp. 119, 121.

27. In the 1772-1776 period 7 grand jurors were fined 10 pounds each for non-attendance at the Supreme Court. Id., 1772-1776, p. 112.

28. For non-attendance at Supreme Court by 579 petit jurors and 260 grand jurors during 1775-1781 period; the grand jurors were fined from 5 to 10 pounds, and the petit jurors were fined from 20 shillings to 10 pounds. Id., 1775-1781, pp. 1, 30, 32, 150, 152, 169, 173, 208-209, 210, 225, 229, 231, 234-235, 239, 282-83, 289, 302, 307, and 491 (grand jurors), and pp. 72, 180, 187, 188, 191, 192, 197, 217, 455, 508, 517-518, 527, 533 and 544 (petit jurors). For non-attendance at court by 125 constables, each fined from 3 to 10 pounds (Id., pp. 246-247, 283, 289).

29. For non-attendance at Supreme Court by 43 grand jurors and 170 petit jurors; 33 grand jurors and 2 petit jurors fined 40 shillings, 168 petit jurors fined from 13 shillings to 13 shillings and 4 pence, and 10 grand jurors fined 10 shillings. Id., 1781-1783, pp. 1, 124, 135, 321, 475, 500. For non-attendance at court by 32 constables, each fined 40 shillings. Id., 549.

30. For riot and having obstructed a court martial in

progress; after indictment and trial to the court, defendant found guilty and ordered to pay a fine of 3 shillings, 4 pence together with costs and to stand committed until fine and costs paid (Id., p. 97).

31. For having failed to return a *capias at satisfaciendum* in one case and for failing to pay into court a sum of money in another case; sheriff ordered attached. Id., 19 Jan. 1790-8 May 1790, p. 158 (Jan. Term).

32. For issuance by justice of the peace of a writ of restitution after a writ of certiorari had issued from the Supreme Court; justice of peace held to be in contempt as a matter of law, although he intended no contempt, and fine was assessed at 6 pence. Id., 20 Jan. 1795-7 Nov. 1795, pp. 445, 449.

NORTH CAROLINA

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I. Judicial Establishment

North Carolina was a proprietary colony until 1729 when it became a royal province. The General Court was established c. 1684 and was held by the Governor and Council until 1697; after this date it was held by judges commissioned by the Governor. For most of the colonial period it was the principal court of original jurisdiction in civil causes and in the more serious crimes (those extending to life and limb), in its later capacity being designated as a Court of Oyer and Terminer. It also exercised appellate jurisdiction over the County and Precinct Courts. District Courts of Assize, Oyer and Terminer and General Gaol Delivery were established in 1738. The court system was reorganized in 1754 and Supreme Courts of Justice, Oyer and Terminer and General Gaol Delivery were established at New Bern, Edenton, Enfield, Salisbury and

Wilmington. The name was changed to Superior Courts in 1760. In 1782, the Chancery Court was abolished, its equity jurisdiction conferred upon the Superior Courts, and the title changed to Superior Courts of Law and Equity. Research was confined to the relatively few surviving records of the General Court.

II. Colony and State Acts Relating to Contempt

A. *Failure of Jurors to Attend Court*

1. A November 1723 Act of the General Assembly (An Act to Provide Indifferent Jurymen in all Causes, Civil and Criminal) provided that any person duly chosen, summoned and returned to serve as a juror who did not appear or, after appearance, absented himself from the court before being discharged was to forfeit 30 shillings. Ms. Laws of North-Carolina, November 1723 Session, pp. 259, 260-61 (Department of Archives and History, Raleigh, N.C.).

2. A 1748 Act (An Act, to provide indifferent Jurymen in all Causes, both Civil and Criminal, and for an Allowance for their Attendance) enacted that every person chosen, summoned and returned as a juror who did not appear was to forefeit 30 pounds proclamation money; any such person who, after appearance, absented himself from court before being discharged was to pay such fine not exceeding 5 pounds proclamation money as the court should impose, such fines to be levied by the sheriff upon court order; no juryman's issues making default should be saved, but by special order of the court, or some just and reasonable cause, proved upon oath and certified the next succeeding court. A Collection of All The Public Acts of Assembly of The

Province of North-Carolina: Now in Force and Use (ed. S. Swann, 1752), 264; State Records of North Carolina, Vol. 23, p. 290.

3. A further Act directing the Method of Appointing Jurymen in all Causes, criminal and civil, passed in November 1762, provided that any juryman (including talesman) failing to appear in the General Court was to be fined 3 pounds proclamation money; a fine of 40 shillings was to be levied on any juror, grand or petit, who failed to appear or to give his attendance until discharged in any Inferior Court. A Collection of All the Public Acts of Assembly of the Province of North-Carolina: Now in Force and Use, 270-271 (1764); State Records of North Carolina, Vol. 23, pp. 576-77.

4. An October 1764 act provided that any juror who failed to appear in the Mayor's Court of Wilmington was to be fined not exceeding 3 pounds proclamation money, or in the case of talesmen, not exceeding 20 shillings, unless sufficient cause were shown. A Collection of All The Public Acts of Assembly of The Province of North-Carolina: Now in Force and Use, 378 (1764); State Records of North Carolina, Vol. 23, p. 655.

5. A 1764 act continuing and amending the 1762 act aforesaid increased the fine for non-attending jurors in the Superior Courts to 5 pounds proclamation money; it also provided for a fine of 3 pounds proclamation money for jurors failing to appear when summoned to view land in suits wherein the title or bounds of land come in question or to attend to try the issue in the cause. State Records of North Carolina, Vol. 23, pp. 634-36.

6. A 1766 act contained substantially the same pro-

visions for non-attending jurors as the 1762 act, as amended by the 1764 act, except that the fine for non-attending jurors summoned to view lands was increased to 5 pounds proclamation money. State Records of North Carolina, Vol. 23, pp. 704-08. A 1773 act omitted the provisions with respect to jurors summoned to view lands but continued the other provisions as to fines for non-attending jurors. Id., pp. 911-14.

7. An act of the General Assembly of December 5, 1767, provided that any person who failed to appear to serve as a petit or grand juror at the Oyer and Terminer Courts was to be fined 3 pounds to the use of the county. Complete Revisal of All Acts of Assembly of The Province of North-Carolina Now in Force and Use, p. 386 (1773).

8. The usual provision for a 40 shilling fine for jurors not attending the Inferior Courts was included in a 1774 act relating to Inferior Courts of Pleas and Quarter Sessions. State Records of North Carolina, Vol. 23, p. 940.

9. A 1774 act relating to Courts of Oyer and Terminer and General Gaol Delivery provided for a fine of 3 pounds proclamation money for non-attending jurors, grand or petit. State Records of North Carolina, Vol. 23, p. 947.

10. 1779 act provided that any person summoned to serve as juror in the Superior Court who failed to appear was to be fined 200 pounds, unless sufficient cause were shown; persons summoned from the bystanders who did not appear and serve as jurors were to be fined 50 pounds unless sufficient cause were shown. Any person summoned to appear as a juror at any

County Court who failed to appear or to give his attendance until discharged by the court was to be fined in a sum not exceeding 50 pounds, unless sufficient cause were shown. Laws of the State of North-Carolina (publ., James Iredell, 1791), pp. 386-88.

11. By a 1783 act the penalties for non-attendance by jurors in the Superior Court were increased to 10 pounds specie and in the County Courts to 5 pounds specie. It was also provided that any person summoned to attend such courts as a talesman who failed to appear and attend was to be amerced at the discretion of the court, not exceeding 20 shillings specie, execution to issue against the body or goods of the delinquent for such amercement and costs. Id. pp. 457-58.

12. A 1798 act relating to the Superior Court of the Wilmington District provided that jurors failing to attend were to be subject to the same fines as theretofore imposed by law. Laws of North-Carolina, 1798, p. 25 in Appendix to Laws of the State of North-Carolina (1791).

B. *Failure of Witnesses to Appear or Testify*

1. A 1715 act (An Act concerning evidences) provided that all subpoenas for summoning evidences or witnesses should have inserted therein a penalty of 100 pounds for the non-appearance of the witness; this penalty was to make good all such damages as should be adjudged by the court to occur therefrom to the party summoning the witness without the necessity of other process by execution. The act further provided that a witness, duly summoned, who refused to testify under oath, was to be committed to the custody of the marshal

or deputy until such time as he would so testify. State Records of North Carolina, Vol. 23, p. 20.

2. A 1746 act provided that any witness, duly summoned to the General Court, who failed to appear, was to forfeit to the person at whose suit the summons issued 20 pounds proclamation money and was to be further liable to an action on the case for whatever damages such person should sustain for want of such witness' testimony, unless sufficient cause were shown. The act also provided that any witness who appeared upon summons in the General or County Court and refused to testify upon oath was to be committed to the common gaol without bail or mainprize until willing to so testify. A Collection of All the Public Acts of Assembly of The Province of North-Carolina: Now in Force and Use 250 (1762); State Records of North Carolina, Vol 23, pp. 558-59.

3. A 1762 Act establishing Inferior Courts of Pleas and Quarter Sessions provided that witnesses failing to attend upon summons were to be liable to the same penalties, fines, forfeitures and actions as witnesses summoned to attend the Superior Courts were liable and subject to in like cases. State Records of North Carolina, Vol. 23, p. 573.

4. Acts passed in 1766, 1767 and 1773 relating to the Superior Courts of Justice contained substantially the same provisions with respect to witnesses as the 1762 act. Complete Revisal of All Acts of Assembly of the Province of North-Carolina Now in Force, pp. 382-83 (1773); State Records of North Carolina, Vol. 23, pp. 698-99, 881-82.

5. A 1774 act relating to Inferior Courts of Pleas and Quarter Sessions provided that any witness failing to attend pursuant to summons, or to attend until discharged, was to forfeit 10 pounds proclamation money to the person summoning such witness and to be liable to the party damaged for want of such witness' testimony for his full damages and costs, unless sufficient cause were shown. State Records of North Carolina, Vol. 23, pp. 938-39.

6. A 1777 law provided that every witness summoned to appear at any Superior or County Court and not appearing and continuing until discharged was to forfeit to the party at whose instance the subpoena was issued the sum of 50 pounds and to be further liable to the action of such party for the full damages which might be sustained for want of such witness' testimony, to be recovered by scire facias. Any person summoned as a witness in such courts or before any person appointed to take depositions refusing to give testimony on oath was to be committed by the court or commissioner to the common prison without bail or mainprize until willing to testify. Lastly, every witness summoned to appear in any such court on a criminal prosecution or plea of the State not appearing and continuing until discharged was to forfeit 100 pounds to the use of the State, unless sufficient cause were shown. Laws of the State of North-Carolina, pp. 305-07 (1791).

C. *Refusal To Serve As Court Officers*

1. Several acts of 1738 provided that any person refusing to accept the office of sheriff and to perform the duties thereof was to forfeit the sum of eight pounds

proclamation money, one moiety to the person suing and one moiety to the use of the province, to be recovered by action of debt, bill, plaint or information in any court of record. A Collection of All The Public Acts of Assembly of The Province of North-Carolina: Now in Force and Use, pp. 87, 96 (1752); State Records of North Carolina, Vol. 23, pp. 123-24, 130.

2. A 1741 act provided that any person appointed constable who neglected or refused to qualify himself, without showing sufficient cause, should forfeit the sum of 50 shillings proclamation money to be recovered by warrant from any two justices to the use of the county where such constable was appointed. A Collection of All the Public Acts of Assembly of the Province of North-Carolina: Now in Force and Use, p. 132 (1752); State Records of North Carolina, Vol. 23, p. 162. The same provision appears in the 1791 collected laws. Laws of The State of North-Carolina, p. 70 (1791).

3. A 1766 act provided that any person refusing to accept and execute the office of sheriff was to forfeit and pay 10 pounds proclamation money to the use of the public, to be recovered in the name of the governor by action of debt, bill, plaint or information. State Records of North Carolina, Vol. 23, p. 715. A 1777 act contained substantially the same provision, except that the forfeiture was fixed at the sum of 50 pounds lawful money. Laws of the State of North-Carolina, p. 331 (1791).

D. *Failure to Perform Official Duties*

1. A 1715 act provided that if the marshall or his deputy should neglect to execute any writ issuing out

of the General Court or a Precinct Court, he should, on motion of the plaintiff, be amerced to pay to the party aggrieved all such cost as occurred by taking out such writ or process, unless sufficient excuse was shown. State Records of North Carolina, Vol. 23, p. 18.

2. A 1746 act provided that any sheriff neglecting to execute any writ issuing out of the General Court or any County Court, was, upon motion of the party aggrieved, to be ordered to pay to such party all costs and charges incurred in taking out such writ or process and be further liable to the suit of the party injured. State Records of North Carolina, Vol. 23, p. 258.

3. A 1741 act provided that if any constable refused or neglected to serve any precept directed to him by any justice of the peace, he should on the complaint of the party prosecuting be fined at the discretion of the court of which the justice was a member, to be paid to the complainant. A Collection of All the Public Acts of Assembly of The Province of North-Carolina: Now in Force and Use, p. 132 (1752); State Records of North Carolina, Vol. 23, p. 162. The same provision appears in the 1791 collected laws. Laws of the State of North-Carolina, p. 70 (1791).

4. A 1738 act provided that every sheriff failing to make sufficient return of any precept to him directed, for every such offense, should forfeit the sum of 5 pounds proclamation money, unless sufficient cause were shown, one moiety to the King, the other to the person suing in an action of debt, bill, plaint or information in any court of record. Such sheriff was also to be liable in an action at common law at the suit of the party injured for any damage sustained by such failure.

For every false return a sheriff was to forfeit 10 pounds proclamation money to be recovered as aforesaid, as well as be liable to an action at common law for any damage sustained. A Collection of All the Public Acts of Assembly of The Province of North-Carolina: Now in Force and Use, p. 88 (1752).

5. A 1766 act raised the forfeiture for failing to make a sufficient return of any precept and for making a false return to 50 pounds proclamation money; extended such penalty to coroners to whom process was directed; and provided a 10 pounds proclamation money forfeiture for failure by a sheriff to levy execution when so empowered, recoverable by any person suing for the same. State Records of North Carolina, Vol. 23, pp. 716-17. Substantially the same provisions were contained in a 1777 act, except that the forfeiture for failure to levy execution was raised to 50 pounds. Laws of the State of North-Carolina, pp. 331-32 (1791).

E. *Failure to Obey Court Rules and Orders*

1. The November 1723 Act to Provide Indifferent Jurymen in all Causes Civil and Criminal provided *inter alia* that every judge, justice, sheriff, marshall, officer or minister neglecting, refusing or omitting to observe and keep all or any of the rules, orders or clauses provided in the act was to forfeit 100 pounds for each default. Ms. Laws of North-Carolina, November 1723 Session, pp. 259, 260-61 (Department of Archives and History, Raleigh, North Carolina).

2. A 1748 law provided that judges, justices, sheriffs, officers and ministers take an oath that they would follow the rules, methods, manner and way of choosing

jurymen provided in such act. Every such person neglecting or refusing to take such oath was to forfeit and pay 20 pounds proclamation money, one moiety to the person suing, the other to the use of the public, to be recovered by bill, plaint or information in any court of record. A Collection of All the Public Acts of Assembly, of The Province of North-Carolina: Now in Force and Use, p. 265 (1752).

3. Nothing comparable to the above provisions appears in the later acts directing the method of appointing jurors.

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court*

Fifteen persons failing to appear when summoned as jurors in General Court fined 30 shillings each (Ms. General Court Minute Docket, 1724-1730, p. 158 (Oct. 25, 1726), Department of Archives and History, Raleigh, North Carolina); twenty-two persons similarly fined (id., p. 198; March 28, 1727); twenty-three persons similarly fined (id., p. 239; July 25, 1727); 20 persons similarly fined (id., p. 274, Oct. 31, 1727); twenty-one persons similarly fined (id., p. 300, March 26, 1728); twenty-six persons similarly fined (id., p. 316, August 6, 1728); fifteen persons similarly fined (id., p. 343, Oct. 29, 1728); twelve persons similarly fined (id., p. 368, July 29, 1729); five persons fined 10 shillings each for non-appearance as jurors at Court Oyer and Terminer (id., p. 411, Oct. 28, 1729); twenty persons fined 30 shillings each for non-appearance as jurors (Ms. General Court Minutes, 1725-1751, p. 4; Oct. 31, 1727); eight persons similarly fined (id., entry

sub. July 31, 1732); five persons failing to appear as jurors at Oyer and Terminer Court fined 10 shillings each with marshall ordered to take them into custody until payment made (id., p. 2, March 29, 1733).

IV. Extension of Laws of England to Colony or State

1. A 1715 act entitled An Act for the more effectual observing of the Queen's Peace, and establishing a good and lasting Foundation of Government in North-Carolina (Laws of North Carolina (ed. Iredell, 1791) p. 17) provided in part that

> "... it appearing by the Charter, that the Powers therein granted of making Laws, are limited with this Expression, *viz.* '*Provided,* Such Laws be consonant with Reason, and as near as may be, agreeable to the Laws and Customs of our Kingdom of England.' From thence it is manifest, That the Laws of England are the Laws of this Government, as far as they are compatible with our Way of Living and Trade:
>
> "VI. Be it therefore enacted ... That the Common Law is, and shall be, in Force, in this Government, except such Part in the Practice, in the Issuing and Return of Writs, and Proceedings in the Court of Westminster; which for Want of several Officers cannot be put in Execution; which ought to be supplied by Rules of the General Court of this Government, being first approved of by the Governor and Council, which shall be good in Law, from Time to Time, till it shall be altered by Act of Assembly.
>
> "VII. And be it further enacted ... That all Statute Laws of England, made for maintaining the Queen's Royal Prerogative, and the Security of her Royal Person, and Succession of the Crown,

and all such Laws made for the Establishment of the Church, and the Laws made for the Indulgence to Protestant Dissenters, and all Laws providing for the Privileges of the People, and Security of Trade; as also, all Statute Laws made for Limitation of Actions, and preventing Immorality and Fraud, and confirming Inheritances and Titles of Land, are and shall be in Force here, although this Province, or the Plantations in general, are not therein named . . ."

2. In 1749 a further Law was enacted (An Act to put in Force in this Province, the several Statutes of the Kingdom of England, or South-Britain, therein particularly mentioned) but was disallowed by the King in Council, April 8, 1754. Laws of North Carolina, Ch. 1 (1749). While the act was primarily concerned with the extention of acts of Parliament it did provide in Section VI as follows:

"And be it further Enacted . . . That all and every Part of the Common Law of England, where the same is not altered by the above enumerated Acts, or inconsistent with the particular Constitutions, Customs, and Laws of this Province, excepting so much thereof as hath Relation to the ancient Tenures . . . and also excepting that Part of the Common Law which relates to Matters of Ecclesiastical, which are inconsistent with, or repugnant to, the Settlement of the Church of England in this Province, by the Acts of Assembly thereof; be, and is hereby made and declared to be in as full Force and Virtue within this Province, as the same is, or ought to be, within the said Kingdom of England . . ."

3. In 1778 the General Assembly of the State of North Carolina passed An Act to enforce such Parts of the

Statute and Common Laws as have been heretofore in Force and Use here, and the Acts of Assembly made and passed when this Territory was under the Government of the Late Proprietors and the Crown of Great-Britain. Laws of North Carolina (ed. Iredell, 1791), p. 353. The act provided in part:

> "I. Whereas Doubts may arise, upon the Revolution in Government, whether any and what Laws continue in Force here. For Prevention of which,
>
> "II. Be it enacted . . . That all such Statutes and such Parts of the Common Law, as were heretofore in Force and Use within this Territory, and all the Acts of the late General Assemblies thereof, or so much of the said Statutes, Common Law, and Acts of Assembly, as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and the Form of Government therein established, and which have not been otherwise provided for, in the Whole or in Part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full Force within this State."

V. Contempt Cases Arising Under Common Law or Usage

1. One Thomas Miller being summoned to attend the General Court as a juryman "contemptuously departed without the Court's excuse;" the court on May 28, 1697 ordered that the marshal take Miller into custody until he found good and sufficient security to appear at the next court to answer for his contempt. Miller, bound over, appeared at the next court and upon his humble petition was discharged paying costs. Ms. General Court Minutes, 1695-1712, pp. 103, 162 (Department of Archives and History, Raleigh, North Carolina).

2. One James Blount, summoned as a juryman and failing to appear, the General Court on November 1, 1697 ordered the marshal to take him into custody until the next General Court to answer for his contempt. Blount, bound over, appeared and upon his humble petition was discharged paying costs. Id., pp. 162, 164.

3. Two persons failing to attend as jurors on October 11, 1697 were ordered arrested and confined until they gave good security for their appearance at the next General Court to answer for their contempt. One, bound over, was discharged. Id., pp. 144-45, 164.

4. One Henry Pendleton, contemptuously refusing the duty of juryman, was ordered arrested and confined until he put up good security for his appearance at the next General Court. Id., p. 162.

5. At a March 3, 1697/8 General Court it was ordered that five persons who had failed to appear as jurors be taken into custody by the marshall until they became bound in good security for their appearance at the next court to answer for their contempt and to be of good behavior in the meantime. Id., p. 168.

6. One John Barrow, summoned to attend as a juryman and failing to make his appearance, the General Court on March 24, 1697 ordered that he be summoned to appear at the next General Court to answer his contempt. Barrow appeared and was discharged paying costs. Id., p. 172.

7. The General Court on March 24, 1697 ordered that two non-attending jurymen be taken into custody by the marshal and detained until they became bound with good and sufficient surety for their appearance to answer for their contempts. Id., p. 172.

8. At the July 27, 1698 General Court one James Pollock, bound over for his contempt in not appearing at the last court when summoned as a juryman, submitted and upon tendering as excuse was discharged paying costs. Id., p. 187.

9. One Thomas Long, bound over for his contempt in departing the last General Court without permission, being summoned as a juryman, submitted on July 27, 1698 and was discharged paying his fees. Id., p. 191.

10. Samuel Slade and Richard Sanderford having been summoned to give evidence for the crown and not having made their appearance, the General Court ordered that the marshal take them into custody untill they gave security for their appearance to answer for their contempt. Ms. General Court Minutes, 1695-1712, p. 1; July 27, 1698.

11. Jeremiah Goodridge, summoned as a crown witness, failing to appear, the General Court ordered that the marshal take him into custody until he gave security to answer for his contempt at the next court. Id., entry sub. Oct. 26, 1703.

12. Some evidence as to judicial practice with respect to Quakers refusing to testify under oath appears in a 1715 act (An Act for Liberty of Conscience and that the Solemn Affirmation of the People called Quakers shall be accepted instead of an Oath in the usual form). The preamble of this act recited that "divers Dissenters commonly called Quakers refusing to take an Oath in Courts of Justice and other Places are lyable to be emprisoned and their Estates sequestred by Process of Contempts Issuing out of such Courts to the Ruin of themselves and familyes." State Records of North

Carolina (collected and edited W. Clark, 1904), Vol. 23, Laws 1715-1776, p. 11.

13. One John Bennett, bound over to the General Court for a contempt in not rendering obedience to a warrant given against him by a justice of the peace, upon his submission at the March 3, 1697/8 court was ordered to appear at the next Precinct Court, make his submission and crave the pardon of the court, promising obedience for the future. Ms. General Court Mins., 1695-1712, p. 165.

14. One Richard Atkinson, summoned to answer the complaint of his wife, contemptuously refused to appear; the General Court ordered that he be arrested and confined until he put up good security to appear at the next court. Ms. General Court Minutes, 1695-1712, p. 214; March 10, 1699.

15. One Wm. Braswell, pleading guilty to an indictment for having abused a constable in the execution of his office, was fined 3 pounds in an Oyer and Terminer Court (c. 1720) and entered into a recognizance for good behavior in the sum of 10 pounds. Ms. General Court Minutes, 1695-1712, p. 54. A similar entry is found with respect to Thomas Marshall who was fined 20 shillings and also entered into a 10 pound recognizance for good behavior. Id., p. 54.

16. At a November 3, 1720 session of the Court of Oyer and Terminer Jeremiah Vaill, being called to answer a presentment of the grand jury for abusing John Blount, one of the justices of the General Court, failed to appear, the marshal having failed to take him into custody according to the order of the last court. It was accordingly ordered that Vaill be taken into the cus-

tody of the marshal until he entered into a recognizance to appear at the next General Court to answer the presentment and be of good behavior in the meantime. Ms. General Court Mins., 1695-1712, p. 43. On March 30, 1712 Vaill pleaded not guilty and was tried by a petty jury; the verdict being handed up by the foreman in an irregular manner, the court was of the opinion that it should not be received and, upon motion of the attorney general, ordered that Vaill enter into a recognizance in the amount of 20 pounds to appear at the next General Court and in the meantime to be of good behavior. Id., p. 55.

17. A true bill found by a grand jury in the General Court in November 1727 against one George Allen, upon a prosecution by William Little, the Attorney General, related that at the General Court held and sitting at Edenton on November 2, 1727, "the sayd George having made a motion to the Sayd Court which on Solemn arguing and debate by the sayd Court was rejected and the sayd George being checked for his want of Good manners in Court by the Honorable Christopher Dale Esq. then and still Cheif Justice of the sayd province and the Cheif Justice of the Sayd Court with Thomas Luton Thomas Lovick and Henry Bonner Esquires Members of the Sayd Court then Sitting he the Sayd George in an Impudent manner then and there in open Court Sayd to the Sayd Chief Justice these insolent Words Vizt: I value you not (inuendo) the sayd Cheif Justice thereby holding him and his Authority in contempt and Defyance And Further that he the sayd George then and there in open Court imediately after the aforesayd contemptuous Speeches turned himself

from the Bench to the Common people without the Rayles which were many and uttered the Seditious and opprobious false and Scandalous words and Speeches Vizt: You (inuendo the sayd people) See Gentlemen that I can't have common Justice (inuendo that the Sayd Chief Justice and the rest of the Court denyed doing him common Justice) intending thereby to oppagn and asperse the Justice honor and integrity and authority of the Sayd Court to move the Sayd people then and There present to Sedition, mutiny and insurrection and to further the Sayd flagitious intent the Sayd Court having Ordered thereon the provost Marshall to take the Sayd George Allen into custody to answer for his Sayd Seditious and insolent Speeches and give Bonds for his Good behaviour he the Sayd George imediately fledd to his dwelling house in Edenton aforesaid and gave out in Speeches he would be the death of any Marshall that would offer to meddle with or touch him and Robert Hicks Esq. provost Marshall thereupon going to his the Sayd George Allen's house to take him into custody the sayd provost Marshall was then and there resisted by the Sayd George Allen by a Gunn who swore that if the Sayd Provost Marshall offered to touch him the Sayd George he would Shoot him the Sayd provost Marshall who thereupon making report thereof to the Court was Ordered, to take ayd And the sayd Provost Marshall thereupon with his Deputys and Sundry people commanded in Ayd attempting to take the Sayd George he agin in his House resisted them and Stood out in contempt and defyance and with Armes opposed them All which done with force and Armes in manner aforesayd and the aforesayd most contemptuous

Speeches are an high misdemeanor in utter contempt of Authority and tending to breed mutiny and begett Sedition in the Sayd Province and is against the peace of Our Lord the King that now is his Crown and dignity and contrary to an Act of Assembly in that Case made and provided." Ms. General Court Mins., 1695-1712, pp. 123-24. The Rule of Court entered with respect to the following incident reads in part as follows: "George Allen come into Court and preferred a List of Sundry Evidences he had that he wanted to be sworne in of the King to go to the Grand Jury and the Attorney General being asked if he had any occasion for the sayd Evidences answered he knew nothing of them and thereupon the Sayd George Allen Sayd they were against Sir Richard Everard for breach of the peace in assaulting him and threw down on the Court Table on Indictment ready drawn against the Sayd Sir Richard Everard which was filed And then the Attorney General informed the Court that there was an Indictment already found by a former Grand Jury against the Sayd George Allen for assaulting the Honorable the Governor at that time and going privately armed to Shoot him And the Sayd George Allen and his wife being among those Evidences he offered to be sent to the Grand Jury to prove the assault by the Governor and therefore could not be Evidences for the King but were really designed against him in the End . . . and the Court were of opinion on the whole motion that it was not proper And the sayd George Allen turned himself from the Court to the people Saying take notice Gentlemen I can't have common justice and having just before told the Chief Justice in Court he valued him not

It was thereupon Ordered that the Marshall Should take him into custody till he gave security in One hundred pounds for his good behaviour." id., p. 126. On July 13, 1728 Allen submitted himself to the mercy of the court and acknowledged himself to have been greatly to blame in affronting and abusing the court. The court discharged him without payment of costs. id., p. 142.

18. On December 23, 1728 Chief Justice Christopher Gale of the General Court informed several assistant justices sitting as a court that Sir Richard Everard, the governor of the province, had libelled and caused said Gale to be cited into the Vice-Admiralty Court for the province by a citation from Edmond Porter, the judge thereof, to appear at said Vice-Admiralty Court on December 23rd to answer the libel of said Everard for the sum of 30 pounds, 2 shillings allegedly due for monies paid to one William Ellison, master and owner of the sloop Mary from New York, at the instance of Gale. It was further asserted that said cause was not within the jurisdiction of said Vice-Admiralty Court nor cognizable therein and that said process and all proceedings therein were against law and the acts and statutes in that case made and provided, as Gale was ready to verify. Wherefore Gale sought a writ of prohibition directed to Porter forbidding him to proceed to hold plea of or concerning the said premises or to give sentence or award execution or other process against Gale. A writ of prohibition was granted as prayed until the matter be heard and adjudged if a writ of consultation should issue. However, Porter disobeyed the writ in contempt of the authority of the General Court without making any return or suggesting any reason

for not obeying the writ. Gale accordingly moved the court at the March 1729 court that an attachment issue against the body of Porter so that he be held in close custody until he submitted to the said prohibition and gave satisfaction for his contempts. The court resolved to take time to advise therein until the July court. Ms. General Court Minutes Docket, 1724-1730, pp. 383-84 (March 25, 1729). No further entry appears with respect to this contempt.

19. On December 31, 1728 George Allen (see *supra*, p. 253) was arrested and taken into custody by John Falconer, marshall of the North Carolina Vice-Admiralty Court, by virtue of a warrant or mittimus from Edmond Porter, judge of said court, for a fine of 5 pounds imposed by said judge for a pretended contempt to the court. He was then turned over to John Parker, provost marshall to be put into prison at Edentown and there held close prisoner. Allen thereupon applied to the General Court for a writ of habeas corpus to be discharged from his confinement, his commitment being illegal. The following reasons were given in support of the application: "First for that the Sayd John Falconer is not Marshall of the Admiralty nor hath any legall power to act as Such; Secondly for that the Sayd Fine is not assessed for the King as all Fines ought to be; thirdly for that in truth there was no resistance or contempt but only the Surmise of the Judge that the Sayd George Allen offered (being only as advocate or proctor) in answer to a Citation to Support an appeall to his Majesty from a Judgement of the Sayd Court and also to Shew cause why Judgment should not be Executed In answer to which the sayd George Allen alleged the Sayd Judgment

to be wrong erroneous and injurious and that the Executing thereof contrary to a prohibition and notwithstanding an appeall would be a Subversion of the Laws and an Encroachment on the Liberty of the Subjects and also Severall other things that the argument required and was the truth of the Case which therefore could not be any resistance or Contempt to the Sayd Court; Fourthly for that the Originall matter or Suite upon which all this was offered, was not in the Jurisdiction of the Sayd Court and all Coram non Judice and therefore could not be deemed a Contempt as hath been ruled Vizt: in Second Brownlow 26 and 29 Bullen against Thoyen and in the Case of Sprat against Martin first Ventris and cited in Sea Laws 429." A habeas corpus issued January 1, 1728/9 under the signature of Christopher Gale, the Chief Justice, to the provost marshal to produce the petitioner before the Chief Justice and to summon Falconer. Return of the writ was made before the Chief Justice and Thomas Lovick, one of the assistant justices. At the return Falconer produced the precept of the Vice-Admiralty Court which related that Allen, as advocate for Christopher Gale "appeared in court and produced a plea or answer to a citation which being read was looked upon to be both Scandalous and insolent" and stated that he had taken Allen by nature of this precept. It was thereupon ordered that Allen be released upon security of 30 pounds to appear at the March court to show sufficient cause for his final discharge; this security was accordingly furnished. At the March 1729 court Allen came to show cause for his final discharge but no person appearing to suggest anything to the contrary, after

proclamation made, it was the opinion of the court that Allen be finally discharged. Ms. General Court Minute Docket, 1724-1730, pp. 384-86, March 25, 1729.

20. In January 1729/30 William Little (see *supra*, p. 253) sought a writ of habeas corpus from the General Court to be discharged from confinement, complaining that he had been taken into custody by John Falconer, marshal of the Vice-Admiralty Court of North Carolina (and later turned over to the Provost Marshal of Albemarle County to be held in the prison at Edenton in close custody) by virtue of a warrant or mittimus from Edmond Porter, judge of said Vice-Admiralty Court, for a fine of 100 pounds imposed by the judge for a pretended contempt to the said court. In his petition Little asserted that the confinement was illegal for the following reasons, "First for that the Sayd John Falconer is not Marshall of the Admiralty nor hath any legall power to act as Such. Secondly for that the Register of the Sayd Court being refused by the Sayd Judge there was no legall Register to enter Decrees Orders or Sentences. Thirdly for that the Suite against the Sayd Little as brought was not regularly before the Sayd Judge nor Cognizable but all he did thereon Coram non Judice. Fourthly for that the Recusation made by the Sayd William Little is an Exception to the Judge which the Civill Law admitts of and the Books direct that the Speciall reason's must be assigned, and therefore the Said plea was lawfull and the assigning the Speciall reasons no Contempt to the Court not anyways proroguing thereby his Jurisdiction further than by Law bound etc. And the reasons assigned being all in

fact notoriously known to be true and the Sayd William Little offered and was ready to Evince the Same. Fifthly for that the Sayd William Little appealled from the Sayd Sentence to his Majesty in Council and tendred Sufficient Securitys but was utterly denyed the Same by the Sayd Judge. Sixthly for that the sayd Little was never admonished to pay the Sayd Fine So decreed and sentenced. Seventhly for that a prohibition being duly obtained thereon to stay the Sayd Judge and Officers of the Sayd Court from further proceedings thereon or damaging vexing or molesting the Sayd Little on account thereof until the matter was duly heard and determined and a Consultation granted on the prohibition confirmed." At the return of the habeas corpus on January 28, 1729/30 it appeared that the precept from Porter to Falconer recited that, "William Little Esq. Respondent in a Suite brought against him in his Majestys name by the Honorable the Governor and Isaac Ottiwell Esq. Collector of Port Bath appearing in Court to defend the Same did by his pleas as well as in words protest against the Judge thereof as a Competent Judge and in the face of the open Court accused him with partiality and prejudice and further impudently Suggested that the Judge had Secretly promoted and Stirred up the Sayd Isaac Ottiwell in the Suite now depending in the Sayd Court with many other reflections notoriously false and malitious for which unparalled assurance and assurances the Court hath this day fined the Sayd William Little One hundred pounds this Currency for the use of his Majesty." Upon the return Little was freed from his confinement upon a

recognizance in the amount of 200 pounds conditioned to appear at the March 1730 court to show sufficient cause for his formal discharge. At the said March 1730 court, no further reasons being offered for the continuance of the confinement, the court adjudged the return insufficient and the commitment illegal and unwarrantable and that Little be finally discharged. Ms. General Court Minutes, 1724-1730, pp. 439-41.

21. One Samuel Snowden appeared at the July 28, 1730 [?] General Court to answer for a contempt in disobeying a writ of habeas corpus; he was granted an extension of time to make his defense on giving security in the amount of 200 pounds to appear on the next Monday and to abide the determination of the court. On Oct. 30, 1731 Snowden appeared and upon interrogatories "Sayeth that he ought not to be Charged with any Contempt in not Regarding the writ of habeas Corpus because no Writ or precept was directed unto him, and that Christopher Gale who is said to have signed the Writ, was not then as he apprehends a Legal Judge to grant such writs, and this he is ready to Verifie; wherefore he Prays to be discharged from this Court with his Costs." On November 4, 1731 the court gave its opinion that Snowden in not obeying the writ of habeas corpus was guilty of a contempt and gave judgment that he be fined 5 pounds for the contempt and restore a fine of 50 pounds taken from one David Osheal and stand committed until he performed the same and paid the costs thereof. Ms. General Court Minutes, 1725-1751, entries sub July 28, 1730, Oct. 30, 1731 and Nov. 4, 1731.

22. On March 31, 1732 the General Court, on motion of the Attorney General, ordered that a summons issue

against one Peter Young of Edenton to appear before the court the next morning to answer for speaking contemptuous words against Henry Bonner, one of the assistant judges of the courts. Ms. General Court Minutes, 1725-1751, entry sub March 31, 1732. No further entry appears with respect to this contempt.

PENNSYLVANIA

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I. Judicial Establishment

A portion of the territory comprised within the Province of Pennsylvania consisted of lands on the Delaware conquered by the English from the Dutch in 1664 and included within the royal grant to the Duke of York. While English laws were established in this area c. 1672, it was not until 1676 that Governor Andros of New York introduced the Duke of York's laws and

established courts at New Amstel (later Newcastle), Upland (later Chester) and Whorekill (later Lewes), with civil and criminal jurisdiction, subject to the appellate jurisdiction of the Court of Assizes in New York. When the royal grant of the province of Pennsylvania to William Penn was made in 1681, the area over which the Upland court exercised jurisdiction came within the confines of the patent. In 1684 a Provincial Court was established to exercise appellate jurisdiction over the county courts previously established with limited original jurisdiction, civil and criminal. Shortly thereafter dissatisfaction arose as to the exercise by the Provincial Court of original jurisdiction to the detriment of the county courts. This struggle to decentralize the administration of justice, opposed by the imperial authorities, continued until the 1720's with intermittent fluctuations in the original jurisdictions of the Provincial Court, later called the Supreme Court, and the County Courts. The Lieutenant-Governor and Council exercised appellate jurisdiction at the top level of the judicial hierarchy. Following the Revolution no substantial changes were made in the judicial system apart from the elimination of the appellate jurisdiction of the Lieutenant-Governor and Council. In 1791 a High Court of Appeals and Errors was established with appellate jurisdiction over the Supreme Court. Research was largely confined to the extant records and reports of the Supreme Court (1740-1800).

II. Colony and State Acts Relating to Contempt

A. *General Contempt Powers*

1. A 1707 "Ordinance for Establishing of Courts" empowered the Supreme Court to examine, correct and

punish the contempts, omissions, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers within the several counties. Charter to William Penn, and Laws of the Province of Pennsylvania, p. 320. Substantially the same provisions appear in later acts or ordinances relating to the Supreme Court. Id., pp. 324 (1710 act, disallowed 1713), 352 (1714 ordinance), 360 (1715 act, disallowed 1719), 391 (1722 act), 399 (1727 act, disallowed 1731).

2. A 1713 act authorized the justices of the Orphans' Courts to issue attachments for contempt against persons making default in appearance when summoned and to force obedience to their warrants, sentences and orders concerning any matter or thing cognizable in civil courts by imprisonment of body, or sequestration of lands or goods, as fully as any court of equity might or could do. Statutes at Large of Pennsylvania, 1712-1724, Vol. 3, p. 18 (1896).

B. *Defamation or Abuse of Court or Court Officials*

1. The Duke's Laws provided that, "Whosoever shall speak in Derogation of the Sentence or Judgment of any Court, shall be fined at the Discretion of the next Court of Sessions or Assizes," the warrant to be issued by the clerk. Charter to William Penn, and Laws of the Province of Pennsylvania, passed between the years 1682 and 1700, preceded by the Duke of York's Laws in force from the year 1676 to the year 1682, p. 21 (1879).

2. The Great Law or the Body of Laws of December 7, 1682, provided (c. 22) that anyone who assaulted or menaced a magistrate and was duly convicted thereof,

was to be fined "according to the nature of the fact" and committed to the house of correction at hard labor for one month. Charter and Laws Prov. Pa., p. 113. This was one of the laws put into effect by Governor Fletcher in June 1693. Id., p. 197.

3. The Great Law or the Body of Laws of December 7, 1682, also provided (c. 29) that anyone who spoke slightingly of or abusively against any magistrate or person in office, upon due conviction, was to be punished according to the quality of the magistrate and nature of the offense, but not less than 20 shillings or 10 days' imprisonment at hard labor in the house of correction. Charter and Laws Prov. Pa., p. 115. In 1693 the minimum was changed to 5 shillings and the maximum 50 shillings. Id., p. 227.

4. A law of March 10, 1683-4 provided that if any person spoke in derogation of the sentence or judgment of any court, they were to be fined at the discretion of the court. Id., p. 130. This was one of the laws put into effect by Governor Fletcher in June 1693. Id., p. 204.

5. By statute of November 27, 1700, any person who spoke "rudely anything in derogation of any sentence or judgment" given in any court of record, or who "shall misbehave himself in the said courts during the sitting thereof", was to be fined at the court's discretion not exceeding 40 shillings. Pa. Stat. at Large, 1700-1712, Vol. 2, p. 45. Disallowed by the Queen in Council, February 7, 1705-6.

C. *Misconduct in Presence of Court*

1. The Duke of York's Laws provided as to holding the court of sessions that the cryer or sheriff was to

make proclamation in a certain form, such form reading *inter alia,* "Silence is Commanded in the court whilest his Majesties Governor Counsel and Justices are Sitting upon pain of Imprisonment." Charter and Laws Prov. Pa., p. 21. A similar form appears in the laws made March 10, 1683-4. Id., p. 128.

D. *Failure of Jurors to Attend Court*

1. An addition to the Duke of York's Laws provided that any person nominated to serve on a jury who refused to serve without just cause was to forfeit 20 shillings to be levied by the constable. Charter and Laws Prov. Pa., p. 59.

2. A May 1685 law provided that any juror duly summoned to serve on a jury in any court and neglecting to attend was to be fined not exceeding 10 shillings. Id., p. 176. Substantially the same provision was re-enacted in 1693 and 1700. Id., pp. 215-16.

3. By act of May 20, 1767, non-appearing jurors in the Supreme Court and the Court of Oyer and Terminer were to be fined not exceeding 3 pounds, and jurors failing to appear in the Court of Common Pleas or the Court of Quarter Sessions of the Peace were to be fined not exceeding 40 shillings. Pa. Stat. at Large, 1765-1770, Vol. 7, p. 110.

4. By act of March 19, 1785, petit and grand jurors in any court of record who failed to appear when summoned were to be fined not exceeding 6 pounds as the court thought proper, unless reasonable cause were shown. Pa. Stat. at Large, 1782-1785, Vol. 11, pp. 490, 494.

E. *Failure of Witnesses to Appear or Testify*

1. The Duke of York's Laws provided that a witness subpoenaed and not appearing at a court of sessions was to be fined 20 shillings and, in the case of the Court of Assizes, 40 shillings, or such other fine or punishment as should be adjudged by the court for damage done to the cause by his non-appearance, provided the non-attendance was not attributable to an act of God. Charter and Laws Prov. Pa., p. 7.

2. By a law of May 10, 1690, a witness who neglected to appear at any court upon summons was to be fined at the discretion of a quorum of justices for the benefit of the party wronged. Id., p. 183. This was re-enacted in 1693. Id., p. 218.

3. By a 1700 law crown witnesses who failed to appear in criminal cases, after having been duly summoned, were to be fined at the discretion of a quorum of justices, the fines to be for the benefit of the aggrieved party. Pa. Stat. at Large, 1700-1712, Vol. 2, p. 47. Disallowed by the Queen in Council, Feb. 7, 1705-6.

4. By a March 27, 1713 law any person who failed to attend any Orphans' Court after having been duly summoned was subject to attachment for contempt by the justices of said court. Id., 1712-1724, Vol. 3, p. 18.

5. A 1715 act, disallowed in 1719, authorized the Courts of Common Pleas to issue subpoenas for summoning witnesses in any cause before them upon such fines and penalties as by the rules of the common law and course and practice of the King's Courts at Westminster was usually appointed. Charter and Laws Prov. Pa., p. 362.

F. *Refusal to Assist Court Officers*

1. The Duke of York's Laws provided under Constable as follows:

> "And if any person shall refuse to Assist any Constable in the Execution of his Office . . . They shall pay for neglect thereof ten Shillings to the use of the Town of which he is Constable To be Levyed by warrant from any Justice before whom such Offender shall be brought And if it appears by good Testimony that any shall wilfully or Contemptuously refuse or neglect to assist any Constable as is before expressed, he shall pay to the use aforesaid forty Shillings. . . ." [Charter and Laws Prov. Pa., p. 22.]

G. *Refusal to Serve as Court Officers*

1. An addition to the Duke's Laws provided that any person duly elected who refused to serve in the office of constable was to forfeit 5 pounds. Charter and Laws Prov. Pa., p. 63.

H. *Failure to Perform Official Duties*

1. An addition to the Duke of York's Laws provided that any justice of the peace or high constable who was absent from the sessions in his riding or from the General Court of Assizes was to pay 10 pounds for every days absence and every constable for each default 5 pounds. Charter and Laws Prov. Pa., p. 60.

2. A May, 1685 law provided that all justices of the peace attend every county court within their respective places under penalty of any sum not exceeding 30 shillings. Id., p. 176. This law was abrogated in 1693.

3. A 1693 law re-enacted in 1700 provided that a

sheriff neglecting to summon a sufficient number of freemen to serve as jurors in the ordinary courts of justice was to be liable to pay double damages to the party aggrieved. Charter and Laws Prov. Pa. 214; Statutes at Large Pa., 1700-1712, Vol. 2, p. 132.

III. Contempt Cases Arising Under Colony and State Acts

The research on the limited extant records of the Supreme Court uncovered no cases in this category.

IV. Extension of Laws of England to Colony or State

1. The 1707 "Ordinance for Establishing of Courts" provided that the Supreme Court should generally administer common justice to all persons as fully and amply to all intents and purposes whatsoever as the Justices of the Court of Queens Bench, Common Pleas and Exchequer at Westminster might or could do. Charter and Laws Prov. Pa., p. 320. This same provision appeared in a 1714 ordinance. Id., p. 352. In the 1722 act the provision read: "And generally shall minister justice to all persons and exercise the Jurisdictions and powers hereby Granted concerning all and singular the premises according to Law, as fully and amply to all Intents and purposes whatsoever as the Justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them, may or can do." Id., p. 391. Substantially the same provision appears in a 1727 act relating to the Supreme Court, disallowed in 1731 (id., p. 399), and in the same 1727 act, disallowed in 1731, relating to the Courts of Common Pleas (id., pp. 401-402).

2. In several acts dealing with jurisdiction in criminal matters grants of authority were couched in terms

of what Justices of Assize, Justices of Oyer and Terminer and of Gaol Delivery might or could do in Great Britain. Id., pp. 330, 356, 361.

3. A 1718 act of Assembly, entitled An Act for the advancement of justice, and more certain administration thereof, in an attempt to establish what acts of Parliament should be considered in force in the province, recited *inter alia:*

> ". . . whereas it is a settled point, that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts." [Stat. at Large Pa., Vol. 3, 1712-1724, p. 199.]

4. In *Morris's Lessee* v. *Vanderen,* 1 Dallas 64 (1782), Chief Justice McKean in charging a Supreme Court jury stated in part (at p. 67):

> ". . . It is the opinion of the Court, however, that the common law of *England* has always been in force in *Pennsylvania:* that all statutes made in Great Britain, before the settlement of Pennsylvania, have no force here, unless they are convenient and adapted to the circumstances of the country and that all the statutes made since the settlement of *Pennsylvania,* have no force here, *unless the colonies are particularly* named."

5. The 1715 act relating to the Supreme Court also provided that for disobedience to or non-performance of the orders and decrees of the Supreme Court the court (with jurisdiction in both law and equity) "shall award all such process of contempt against the persons and Estates of him or them that shall be in contempt, or

refuse obedience to any of the said orders and Decrees; and make and Execute like process, Orders and proceedings thereupon, as are and hath been used in like cases, in or by the said Courts of Chancery or Exchequer in Great Britain". Charter and Laws Prov. Pa., pp.360-61. See also the reference to observance as near as may be of the rules and practice of the Court of Chancery in England by Equity Courts on the county level. Id., p. 342.

6. An Act of the Assembly of the Commonwealth of Pennsylvania passed January 28, 1777 provided:

> "Section 1 . . . That each and every one of the laws or acts of general assembly that were in force and binding on the inhabitants of the said province on the fourteenth day of May last shall be in force and binding on the inhabitants of this state from and after the tenth day of February next as fully and effectually to all intents and purposes, as if the said laws and each of them had been made or enacted by this general assembly . . . and the common law and such of the statute laws of England as have heretofore been in force in the said province, except as is hereinafter excepted."

Such exceptions do not relate to the law of contempt. Stat. at Large Pa., 1776-1779, Vol. 9, p. 30.

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempts*

1. In the famous case of *Respublica* v. *Oswald,* 1 Dallas 319 (1788) Eleazar Oswald, publisher of the Independent Gazette and defendant in a libel action by one Andrew Browne published a narrative and comment on an application for special bail then pending before the

Supreme Court. Counsel for Browne moved for a rule to show cause why an attachment should not issue against Oswald on the ground that the comment amounted to contempt of court. Chief Justice McKean for the court held that the comment amounted to a contempt as it prejudiced the public (a part of whom were to be summoned as jurors) with respect to the merits of a cause depending before the court and corrupted the administration of justice. As to the method of punishment, proceeding by attachment was as old as the law itself and no act of legislation or section of the constitution had altered or suspended it. The constitution declared that trials by jury should be as theretofore, but it could not be contended that the offense with which Oswald was charged was theretofore tried by jury. If a man committed an outrage in the face of the court, no further evidence was necessary to commit him of the offense than the usual view of the judges. In the instant case the proof from the inspection of the paper was as full and satisfactory as any that could be offered and whether the publication amounted to a contempt was a question of law in the province of the judges and not of the jury. Left to the customary forms of a trial by jury the cause might continue long in suspense and the offender persevere in his misconduct. Justice and propriety called upon the court to proceed by attachment. The court, and likewise all the judges of England, were of the opinion that without the power to punish by attachment no court could possibly exist. The law on the subject was of immemorial antiquity and there was not any period when it could be said to have ceased or discontinued. Oswald, upon refusal to answer inter-

rogatories, was accordingly fined £10 and ordered to be imprisoned for the space of one month and afterwards until the fine and costs were paid. Although the court found Oswald's crime to be "very great" and of a "very heinous nature," it took into account his "very small circumstances" in its sentencing.

The events in *Respublica* v. *Oswald* took place in July 1788. While Oswald served his prison sentence the Supreme Executive Council remitted the fine, apparently without application by Oswald who sought to arouse public opinion against the contempt proceedings (see his account of the proceedings in The Pennsylvania Gazette, July 30, 1788). In the Pennsylvania Archives are two undated and unsigned opinions, indorsed "Opinion on the case of Eleazar Oswald", regarding the power of the President and Council to pardon in the case of contempts, apparently rendered prior to the pardoning of Oswald. The two opinions set forth below are printed in Pennsylvania Archives, Vol. XII (1st Ser.), Appendix, pp. 83-85; the first from internal evidence appears to have been rendered by Chief Justice McKean.

> "Under the general words of the 20th Sect. of the Constitution 'That the President and Council shall have power to grant pardons and remit fines in all cases whatsoever except in cases of impeachment,' it does not appear how their authority to interpose in the Case of Col'o Oswald can well be questioned. But the expediency or decency of such a measure are much to be feared.
>
> "From what is said in 4th Blackstons Com'ries, p. 280 to 285 the proceedings were regular, necessary and conformable to usage which is as old as

the Law itself. Great variety of other cases might be put to show that the very existence of the Courts depends on their exercise of this power as often as circumstances may call for it. If Council are to interpose by granting of pardons they may by this means destroy the Courts. How dangerous then such interference of one branch of government with another.

"In the case of Col'o Oswald the Court has done what in England has from time immemorial been done by the most upright judges; and in Pennsylvania before and since the revolution the legality of such proceedings was never questioned.

"If a contempt were to go unpunished for ten or twelve months perhaps, till there could be trial by jury it might be so repeated as to oblige all Courts to stop. 'Every man,' says the 9th Sect. of the bill of rights, 'shall have a trial by an impartial Jury of the country.' But it also says, no man shall be deprived of his Liberty but by *the Laws of the Land or the judgment of his peers.* And in Blackstone, p. 282 and 285, it will appear that this is according to *the laws of the Land.* In addition to this the 46th Sect. of the Constitution declares 'the Bill of Rights to be a part of the Constitution.' So that both are to be taken and judged of together, and the 25 Sect. of the Constitution which is subsequent to and explanatory of the Bill of rights, says that 'trials shall be by jury as heretofore.'

"Now a trial by jury was never heard of in a case of this kind, and consequently if 'trials by jury are to be as heretofore' there can be no trial by Jury in this case, nor does any man of legal knowledge suppose it.

"To place this matter in another and stronger point of light, Magna Charta is as binding in Eng-

land as our Constitution is here. By the 14th Chapter it is declared That no Amerciaments shall be assessed but by the Oaths of honest and lawful men of the Vicinage. Yet in cases of attachment they have always been done both there and here, without any jury, as not being cases within the meaning of this clause. Again the 29th Chap. of Magna Charta declares that no freemen shall be taken or imprisoned or dissused of his liberties, but (in the words of our Bill of rights) by lawful judgment of his peers, or by the Law of the land. And yet a jury was never thought of in the case of an attachment for a Contempt.

"Col. Oswald was not committed for refusing to answer interrogatories nor for any abuse of the judges but for a Contempt in publishing a paper calculated to prejudice the public-mind as to a cause depending between him and Mr. Brown.

"A memorable case of this kind happened before the able and upright Lord Chancy'r Hardwick who was spoken of in the publication in the highest terms of approbation, yet as the publication respected the merits of the cause depending, he said, nothing is more incumbent upon courts of Justice than to preserve their proceedings from being misrepresented, nor is there any thing of more pernicious consequence than to prejudice the minds of the public against persons concern'd as parties in causes before the cause is finally heard.

"It has always been my opinion as well as the opinion of those who have sat here before me that such a proceeding ought to be discountenanced. There are, said he, three differ't sorts of Contempts.

One kind of Contempt is scandalizing the Court itself.

Another in abusing parties who have causes depending.

A third in prejudicing mankind before the cause is heard. There cannot, said he, be any thing of greater conseq'ce than to keep the streams of justice clear, and pure, that parties may proceed with safety both to themselves and their Characters. In the Case of Capt. Perry who printed his brief before the cause came on, the offence did not consist in the printing, but the contempt was prejudicing the world with regard to the merits of the cause before it was heard. Upon the whole said he there is no doubt but this is a Contempt of the Court, and therefore he committed the printers.

"If the Commitment is illegal Col'o Oswald can apply to Mr. Shippen for a Habeas corpus. But can Council suppose that they understand the Law better than the judges and pardon on this ground. It may as justly be presumed that there is an end to both Law and government as that Council would take such a measure.

Second opinion:

"That the Supreme Court ought to have the power of punishing Contempts offered to it, by a summary process without the intervention of a jury is hardly to be doubted, seeing that it could not otherwise for a moment preserve its own dignity or pretend to administer the Laws. The Constitution besides continues to it all the powers *usually exercised by such Courts* and this power has been exercised time immemorial.

"The general declaration then concerning the trial by Jury must be understood only of the cases of offences against the ordinary laws of the land, were it otherwise there would be an inconsistency.

"Can the Executive pardon in the case of a Contempt? The words in the constitution concerning the power of pardoning being general seem to include this particular power. But tho' the Executive may well determine upon the merits in ordinary cases and are the proper judges when the Execution of a sentence may with propriety or public safety be dispensed with, yet in the instance of Contempts no such competency can be supposed, therefore applying the maxim That where the reason of a law ceases the law should also cease no such power should be presumed to exist. But if the power of pardon be admitted would its exercise be expedient.

"It is only necessary to show its danger to deny its expedience. The Executive indeed has no power formally to abolish a Court but it is plain to be seen that the power of pardoning in the case of contempts might be effectually exercised to the subversion of all the authority of a Court, and might be a dangerous instrument of party-rage or tyrannical spirit.

"If it be ask'd how a tyrannical court is to be contrould it may be answered the provision is made in the Constitution for the impeachment of unjust Judges."

A further attack by Oswald upon the proceeding and his imprisonment appeared in The Pennsylvania Gazette of September 3, 1788. As to the attempt by Oswald to have the judges of the Supreme Court impeached the following entry from the Assembly records appeared in The Pennsylvania Gazette of October 8, 1788:

"Friday, October 3, in General Assembly, agreeably to the order of the day, the report of the committee of the whole on the memorial of Eleazar

Oswald, read September 30, was read the second time, as follows, viz.

"Resolved, that the charges exhibited by Col. Eleazar Oswald against the Justices of the Supreme Court, and the testimony given in support of them, are not a sufficient ground of impeachment.

"A motion was then made by Mr. Clymer, seconded by Mr. Peters, to postpone the consideration of the said report, in order to introduce the following resolution. vis.

"Resolved, that this House, having in a committee of the whole gone into a full examination of the charges exhibited by Eleazar Oswald, of arbitrary and oppressive proceedings in the Justices of the Supreme Court against the said Eleazar Oswald, are of opinion, that the charges are unsupported by the testimony adduced, and consequently that there is no just cause for the impeaching the said Justices.

"Which was carried in the affirmative.

"It was then moved by Mr. Findley, recorded by Mr. Kennedy, to postpone the consideration of the resolution moved by Mr. Clymer and Mr. Peters, in order to substitute the following, viz.

"Resolved, that the proceedings of the Supreme Court against Col. Eleazar Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the Court, nor against any officer or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the Supreme Court, and respecting some of the judges of the said Court, was an unconstitutional exercise of judicial power and sets an alarming precedent of the most dis-

astrous consequences to the citizens of this commonwealth.

"Resolved, that it be specially recommended to the ensuing General Assembly to define the nature and extent of contempts, and direct their punishment.

"On the question, Will the House agree to the postponement for the purpose aforesaid? The yeas and nays were called by Mr. Firstman's and Mr. Findley, and were as follows, viz—Yeas 22—Nays 35.

"So it was carried in the negative, and the resolution, proposed by Mr. Clymer and Mr. Peters again recurring—On the question, 'Will the House adopt the same?'—the yeas and nays were called by Mr. Kennedy and Mr. Peters, and were as follows, viz. Yeas 34—Nays 23. So it was carried in the affirmative."

A fuller account of the attempted impeachment of the judges appears in the Minutes of the Third Session of the 12th Assembly Commencing September 8, 1788; such minutes constitute pp. 201-80 of a printed volume entitled Minutes of the Assembly of Pennsylvania, 12th, 13th and 14th Sessions, 1787-1790. Entries relating to Oswald's petition are at pp. 203-15, 231, 236-37, 248, 249, 251-52, 259, 264, 268-71.

The Address and Memorial of Oswald (dated September 4, 1788 and set forth at pp. 204-08 of the aforesaid Minutes), after stating the facts of the contempt proceeding, declared in part:

"Your memorialist aspires to considerations of a higher nature, touching the measures which the Supreme Court adopted with him, in immuring him in prison, without even the shadow of a trial, for an imaginary offence, not committed in view of the

court, but at a distance,—before any process was ever returned to the court by any known officer of the law—and when they were not in possession of the cause. . . .

". . . Every attempt, therefore, of changing the law and usage of the country, every design to deviate from and break our constitution, ought most carefully to be observed and timely checked and opposed. . . .

". . . Your memorialist, therefore, held himself justifiable in publishing the address alluded to, which speaks for itself—and, your memorialist humbly conceives, conveys no manner of contempt to the court, not only as the court could not be legally possessed of the cause till the return day of the writ, but because the publication did not touch on the merits of the cause commenced in court, nor obstruct the course of the court in any respect in accepting the Sheriff's return, or in taking your memorialist's appearance, or proceeding in the usual way; nor had the said publication any improper tendency to influence a jury, as the cause could not be tried the first term to which it was returnable. The constituent, descriptive properties of a contempt do not, as your memorialist is well informed, by any means, form the features of the aforesaid address.

"It is laid down in an Essay upon Warrants, etc. in high estimation, supposed to be written by Lord Camden, 'Libels, or defamatory expressions out of court upon what hath passed in court are no let or hindrance to the process of the court, or to national justice; they do not break a spring, clog the wheels, or stop the vibrations of the juridical machine, and therefore do not necessarily require instantaneous remedy. Nothing but absolute neces-

sity can warrant commitment before trial by a jury, the right of every man by *magna charta.* Actual breach of the peace, and actual contempt of law proceedings, vindicate upon that principle such restraint. No other offences do, and least of all those commited by writers'. . . .

"But if your memorialist had committed a contempt, by construction of the Judges, it is no more than a criminal offence in the eye of the law, for which he hath a right to a trial by a jury of his country expressly by our constitution, and is not under the power of attachment to be at the mercy and wild discretion of the court, subject to pain of perpetual imprisonment, to answer upon oath to interrogatories tending to make him accuse himself. [Oswald here sets out the Ninth Section of the Pennsylvania Bill of Rights.]

"That such interrogatories have an unquestionable view to criminate a freeman is very evident; for, unless the answering them one way would convict him, the answering them the other way would not clear him; the affirmation must do one in the same proportion that the negative does the other. Thus out of the mouth of every culprit arises proof for his own condemnation, which is contrary to the fundamentals of law and natural justice, which protect every man from impeaching himself. Indeed this mode of prosecution originated from the odious Star Chamber of old, which was abolished for its oppressive practices, and seems a perfect alien to the genius of our own constitution, which is our greatest bulwark and safeguard.

"But this is not the place for argument or discussion, or your memorialist would proceed to make some comments on the case of *Bingley,* whom the court of *England* deprived of his liberty for a sup-

posed constructive contempt, without allowing him a trial by jury, for refusing to answer interrogatories. It is not the business of your memorialist to step into the field of investigation . . . Upon the event of your legislative deliberations it may depend—Whether the constitution of this state doth not secure the citizens in the possession of personal liberty, and not subject them for constructive offences to be attached at the will and pleasure of a court; nor compel them to accuse themselves, under interrogatories, without the intervention of witnesses and a jury. It will now, it is to be hoped, be decided—Whether the Judges did not infringe the constitution in direct form, in the sentence passed upon your memorialist; and whether, of course, they have made themselves proper objects of impeachment; so that the judgment imposed upon your memorialist may be reversed for its injustice and illegality, and be for ever expunged and disregarded as a precedent in *Pennsylvania.*

The last episode in the Oswald saga took place on October 11th when Judge Bryan ordered Oswald to put up £ 300 security himself with an additional £ 300 bond by another to be of good behavior, especially towards Judge McKean. In an intoxicated and impassioned state Oswald, the day after his release from confinement, had made threats towards McKean and others of a most extravagant and dangerous nature in the course of a tavern discussion. The proceeding took place upon a complaint of McKean. Judge Bryan's opinion and the depositions of two witnesses to Oswald's behavior are in the George Bryan Papers, in the Miscellaneous Manuscripts at The Historical Society of Pennsylvania.

2. For publication of articles in newspapers relating to the merits of a cause pending in the Supreme Court; James Mitchell (the author) and Andrew Brown (the publisher) were ordered to show cause why attachments should not issue against them. On April 13, 1789, after a hearing before the court, Mitchell was fined 3 pounds and ordered to pay the costs of prosecution, and Brown was fined 5 shillings, together with costs. Ms. Supreme Court Appearance Docket, 1789, pp. 415-417 (Office of the Prothonotary, Supreme Court of Pennsylvania, Philadelphia, Pa.).

Among the George Bryan Papers in the Miscellaneous Manuscripts at The Historical Society of Pennsylvania are manuscript notes of a portion of the argument on the motion to show cause on April 11th. Apparently the point of counsel for Mitchell, one J. Levy, was that the instant case was distinguishable from the Oswald Case, that there was no cause before the court. While far from clear, it appears that one or more of Mitchell's articles in the Federal Gazette or "Humphries" had commented on a complaint made by one W, then running for alderman, looking towards the issuance of an information against Mitchell and Brown for libelling him. Part of the notes of argument read: "Does this case subject M[itchell] to attachment. By what law. Not by a municipal law, no; perhaps it will be said by Common Law, not by law of nations. Not a municipal law, as no act of Assembly." Apart from the Oswald Case, all the citations of authority are to English sources—Blackstone's *Commentaries,* Burns' *Justice of the Peace,* Bacon's *Abridgment,* 2 Atkins 471 ("the leading Case of publishing concerning Cause

in Courts"), an act of parliament of 4 Wm. and Mary regarding informations and the reports of Strange Strachan and Salkeld.

B. *Defamation or Abuse of Court or Court Officials.*

1. For having orally abused and physically struck a justice; fined 210 gilders and contemnor ordered to "humbly ask forgiveness of Justice" and the court. Record of the Court at Upland in Pennsylvania, 1676-1681 (ed. E. Armstrong, 1959 reprint), p. 53 (1677).

2. For a Council member's "scurrilous and reflecting words against the court of admiralty"; offender suspended from the Council until "hee [had] his trial, and wer cleared or convicted." Minutes of the Provincial Council of Pennsylvania, Colonial Records, Vol. I (1852), pp. 602-604 (1700).

3. The following exchange of letters between Major General Nathanael Greene and Thomas McKean, Chief Justice of the Supreme Court, regarding an alleged libel upon the magistrates of the State is found in McKean Papers, Vol. 1, pp. 17-19 (The Historical Society of Pennsylvania, Philadelphia, Pa.). The letter from Greene at Camp Valley Forge to McKean, dated June 3, 1778, reads as follows:

> "Col. Robert L. Hooper of North Hampton County, one of my Deputies in the QMG department informs me, he has lately been served with a warrant from under your hand, charging him with having libeled the Magistrates of this State in a Letter of Governour Morris, Esq. and directing the Sheriff to bring him before you at York Town.
>
> "The Col. waited upon me to communicate his situation, and to know if the circumstances of the

Army would admit of his absence—but as the Army is just upon the Wing, and Part of it in all Probability will march through his district, I could not without great necessity consent to his being absent, as there is no other Person that can given the necessary aid upon this occasion.

"As you wish well to the Army and its Operations, I presume you would not desire to call Col. Hooper from his Post, if it can Posibly be avoided, and the necesary forms of Law complyd with, he has not the least objection to entering into a recognizance with ample Surities to appear at any Court where he is legally answerable—neither have I the least desire to interrupt the Course of the Law, or to Secure him from its proper operation.

"Therefore, what I would request of you is to direct some Magistrate in North Hampton County to take Col. Hoppers Recognizance with Such Surities as you may think proper and to Transmit the Same to you, which I Presume will answer every Legal Demand and equally Preserve the dignity of Government."

The reply of McKean, dated June 9, 1778, at York Town, to Greene reads as follows:

"I just now received your favour of the 3 instant and am not a little surprised that the Sheriff of Northampton County should have permitted Col. Robert L. Hooper, after he was arrested by virtue of my Precept, to wait upon you until he had appeared before me.

"You say, Sir, 'Col. Hooper waited upon me to communicate his situation and to know if the circumstances of the army would admit of his absence —but as the army is just upon the wing, and part of it will in all probability march through his district, I could not without great necessity *consent* to his

being absent, as there is *no other person* that can give the necesary aid upon this occasion.'

"I do not think, Sir, that the absence, sickness or even death of Mr. Hopper could be attended with such a consequence, that *no other person* could be found who could give the necesary aid upon this occasion; but what attracts my attention most is your observation that *you* cannot, without great necessity *consent to his being absent.* As to that, Sir, I shall not ask *your consent* nor that of any person in or out of the army, whether my Precept shall be obeyed or not in Pennsylvania.

"The warrant for the arresting Mr. Hopper being special, no other magistrate can take cognizance thereof but myself. The mode you proposed of giving bail cannot be adopted for many reasons.

"I should be very sorry to find, that the execution of criminal law should impede the operations of the army in any instance but should be more so to find the latter impede the former."

4. For having printed a seditious libel against the Supreme Court; sheriff ordered to "take the body" of contemnor, Eleazar Oswald, for such conduct. Ms. Supreme Court Appearance Docket, April 1782-1783, p. 154 (Oct. 12, 1782), see also id., September 1783, pp. 98-99.

5. In Commonwealth v. De Longchamps at a Court of Oyer and Terminer before Chief Justice McKean, and Justices Rush and Bryan, June 24, 1785, the defendant was convicted of having threatened officials of France inside the dwelling house of the Consul General of France to the United States and for having assaulted a French official in the streets. In discussing the charge of threats, Chief Justice McKean held that the words

used inside the minister's house, which was to be considered a "foreign domicil", "may be compared to the same words applied to Judges in the Courts of Justice who sit in representation of the Majesty of the People of Pennsylvania—In which case the offender would be immediately committed to jail without the Previous process of an Indictment by a Grand Jury—the present offence therefore may be punished when the Party is convicted by fine and imprisonment." DuPonceau Papers, The Historical Society of Pennsylvania.

C. *Failure of Jurors to Attend Court.*

1. For non-appearance by 31 jurors in the Court of Oyer and Terminer; each fined 20 shillings. Ms. Supreme Court Appearance Docket, Sept. 1740—Sept. 1751, p. 163.

D. *Failure of Witnesses to Appear or Testify.*

1. For failure of witness to appear in court; attachment issued. Ms. Supreme Court Appearance Docket, Sept. 1774—Sept. 1779, p. 583.

2. For refusing to give evidence before a justice of peace and for failure to attend Supreme Court pursuant to subpoena; attachment issued. Id., April 1787—January 1788, p. 119.

3. For refusal to attend court by witness; attachment issued. Id., April 1787 to January 1788, p. 187.

4. For non-attendance at court by 7 witnesses (3 cases); attachments issued. Id., April 1788—January 1789, pp. 86, 164, 233.

5. For witness declaring that he would not attend

court; fined 10 pounds, later reduced to 3 pounds. Id., 1789, p. 550.

6. In Butcher v. Coats, 1 Dallas 340 (1788), there was no contempt when the two witnesses satisfactorily proved that they were too indisposed to obey the subpoenas.

7. In *Knights' Lesses* v. *Pechen,* 1 Yeates 18 (1791), the court held that an attachment might issue to compel the attendance of a witness during period of Nisi Prius Court, but where the action had been postponed for a term, the application must be made "in bank."

6. In *Butcher* v. *Coats,* 1 Dallas 340 (1788), there was ment issued. Ms. Supreme Court Appearance Docket, 1792, p. 15.

9. In *Ferec* v. *Strome,* 1 Yeates 303 (1793), an attachment had been issued against a material witness for having disobeyed a subpoena, but attachment discharged and witness reprimanded without a fine upon his assertion that he did not conceive himself to have been subpoenaed.

10. For non-appearance at court by witness; attachment issued. Ms. Supreme Court Appearance Docket, December 1795—March 1797, pp. 249-50.

11. For non-appearance at court by witnesses (four cases); attachment issued. Id., May 1796—Sept. 1798, pp. 119, 121, 295, 547.

E. *Failure to Perform Official Duties.*

1. For failure of sheriff to hand over monies to the state by a fixed date; attachment to issue. Ms. Supreme Court Appearance Docket, Sept. 1783-1785, p. 103; see id. at 589, where sheriff was ordered to show cause why the attachment should not issue.

2. For failure of sheriff to report money by a fixed date; attachment to issue. Id., April 1787—Jan. 1788, p. 391.

3. For failure of sheriff to bring money into court; sheriff to show cause why attachment should not issue against him. Id., April 1788—January 1789, p. 112.

4. For sheriff's default of duty; attachment issued. Id., December 1795—March 1797, pp. 244-250.

5. For contempt of Sheriff James Wallace of Cumberland County in neglecting the duties of his office; fined $100 and ordered to enter into a recognizance of $1,000 (with 2 sureties of $500 each) conditioned for appearance in Supreme Court to answer charges that he contemptuously refused to summon juries, that he summoned a grand inquest on his own authority, and for extortion. The court ordered Wallace committed to a common jail until he paid the fine and entered into the recognizance. Id., May 1796—Sept. 1798, p. 224a (Respublica v. James Wallace, Nisi Prius, Carlisle, 21 October 1795).

6. For failure of sheriff to perform duty; attachment issued. Id., Sept. 1798-1800, p. 497.

F. *Failure to Comply with Process.*

1. For forcible retaking possession of property after process of *habere facias;* attachment issued. Ms. Supreme Court Appearance Docket, April 1772—April 1774, p. 89.

2. In *Keeple* v. *Williams,* 1 Dallas 29 (1776), the Supreme Court held that it was a contempt to "pocket" the venire.

3. For frustrating the execution of a writ and improperly detaining money which had been levied; defendants (sheriff, deputy, bailiff, and others) to be liable to attachment, information, commitment or fine "as the case may require." Ms. Supreme Court Appearance Docket, April 1787—January 1788, p. 548.

4. Attachments to issue against sheriffs if they failed to amend return and return a writ. Id., 1789, pp. 412, 469.

5. For disobedience of writ of estrepement; attachment issued. Id., 1791, p. 380.

6. Sheriff to show cause why attachment should not issue if he failed to return a writ. Id., 1791, p. 491.

7. In *Thomas* v. *Cummins,* 1 Yeates 1 (1791), an attachment was awarded against the defendant for contemptuous expressions that he would disregard a writ of estrepement despite the power of the court.

8. In *Delany* v. *Regulators of City of Philadelphia,* 1 Yeates 403 (1794), the Surveyor General, who had initially refused to permit an examination of certain papers, produced the papers when threatened with an attachment.

G. *Failure to Obey Court Rules or Orders.*

1. For refusal by three commissioners of Philadelphia County to obey a court order and pay 47 pounds and 10 shillings out of public funds to one Abraham Nanna for damages sustained by Nanna as the result of a public road being laid across his land; attachments issued against the commissioners for such contempt. Ms. Supreme Court Appearance Docket, April 1769—Sept. 1771, p. 500 (entry dated April 27, 1771). In Sep-

tember 1772, the court ordered that notice be given to the commissioners to show cause why the attachments should not issue against them. Id., April 1772—April 1774, p. 197. In October 1773, the court, after a hearing, ruled that it would take under advisement the claim of the commissioners whether the statute in question should be construed to have the damages paid not by the county but by the parties who had petitioned for and who had been benefited by the road. Id., April 1772—April 1774, p. 393.

RHODE ISLAND

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I. Judicial Establishment

The successive principal courts of original jurisdiction in Rhode Island were the General Court of Trials (1647-1715), the General Court of Trials and Gaol Delivery (1715-1730), the Superior Court of Judicature, Court of Assize, and General Gaol Delivery (1730-1798), and the Supreme Judicial Court (established 1798). These courts also exercised appellate jurisdiction over the several Inferior Courts of Common Pleas (termed Courts of Common Pleas after 1789) and

Courts of General Sessions of the Peace operating at the county level. All the extant records of the General Court of Trials and its successors were examined together with a few of the readily accessible volumes of the inferior courts. For most of the colonial period the General Court (General Assembly) exercised review jurisdiction over the General Court of Trials or the Superior Court of Judicature and at times intervened in judicial proceedings by granting new trials in the court below.

II. Colony and State Acts Relating To Contempt

A. *General Contempt Powers.*

1. The only significant statute providing general contempt powers was a 1798 act establishing the Supreme Judicial Court which *inter alia* authorized such Court "to punish by fine or imprisonment, at the reasonable discretion of said Court, all contempts of authority in any cause or hearing before the same." Public Laws of the State of Rhode Island and Providence Plantations (1798), p. 140. From its language this provision would seem to have been derived from Section 17 of the Judiciary Act of 1789.

2. Another act contained in the 1798 digest (An Act Establishing Courts of Probate) constituted the town councils in the several towns Courts of Probate and provided that all contempts of authority in any cause or hearing before said courts shall be punishable by fine, for the use of the state, not exceeding $20, or imprisonment, not exceeding twelve hours, at the discretion of the court. Id., 277.

B. *Defamation or Abuse of Court or Court Officials*

1. The Code of Laws of 1647 under the heading of "Rebellion" provided inter alia that: "It is allso Rebellion to threat, assault or strike a Judge of Record; and the penaltie to be bound to his good behaviour, and further fined by his Peers. It is also a kind of Rebellion to withstand an arrest, and the execution of Judgment; the penaltie to be bound to his good behaviour, and to be judged by his Peers." 1 Rec. Col. R. I. 163.

2. The collected laws of 1705, in a declaration ascribed to 1663, provided that "we Declare it Rebellion to Threat, assault or Strick A Judge of Records and the Penalty to be bound to his Good Behaviour and further to be fined as shall be adjudged by his pears." Acts and Laws of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705, p. 2.

3. The collected laws of 1719, as part of an Act for Punishing Criminal Offenses, provided that if any person should threaten, assault, strike, abuse or refuse to obey any general officer, justice of the peace, warden or any other officer in the execution of his office, such offender, being duly convicted thereof before any judge or court of record, should be amerced as such judge or court should think fit or should be corporally punished at their discretion, according to the nature of the offense. Acts and Laws of His Majesties Colony of Rhode-Island, and Providence Plantations in America, p. 4 (1719).

4. A similar provision appeared in the collected laws of 1730 except that the alternative of capital punishment was eliminated and the amercement limited to 10

pounds. Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in America, p. 169 (1730). It was continued in the collected laws of 1745 (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence Plantations, in New England, in America, p. 115 (1745).

5. The collected laws of 1767 provided that any person who should threaten, obstruct, insult, assault, strike, or in any other manner abuse any civil or military officer in the execution of his office, or afterwards for having done what appertained to the duty of such officer, or should refuse to obey the lawful commands of such officer, upon conviction thereof, was to forfeit and pay as a fine a sum of money in proportion to the nature of the offense, not exceeding 50 pounds. Acts and Laws of the English Colony of Rhode-Island and Providence-Plantations, in New England, in America, p. 64 (1767).

6. The Code of Laws of 1647, under the heading "Misbehaviour", declared that "for any man to use words of contempt against a chief officer, especially in the execution of his office, is against good manners, and misbehaviour; and his penaltie shall be, to be bound to appeare at the next Court, where such matters are to be Tryed: where, being lawfully convict by his Peers, he shall be bound to his good behaviour, so to remaine for three months space, or till the next Court following." 1 Rec. Col. R. I. 163.

7. The collected laws of 1705 contained the declaration (ascribed to 1663), "That for any man to use words of Contempt against a Chiefe officer Especially in the Execution of his office Its misbehavour and his penallty shall be to be Bound to appear at the next Court of tryalls where being Lawfully Convicted by his Peeres

he shall be bound to his Good Behavour so to remaine [*copy illegible*] to the next Court Following and to be fined by his peers." Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705, p. 2.

C. *Misconduct in Presence of Court.*

1. The Court of Commissioners (General Court) on October 26, 1650 made a rule that if any person misbehaved either rudely or contemptuously in a court of justice, the judges of the court should commit him to the stocks or order him to pay 5 shillings, a jury first finding him guilty. 1 Records of the Colony of Rhode Island and Providence Plantations, in New England (ed. J.R. Bartlett, 1856) 232. The records do not disclose how long this order was in effect. It was not included in the collected Laws and Acts of Her Majesties Colony of Rhode Island, and Providence Plantations Made from the First Settlement in 1636 to 1705 or in any later collected laws.

2. In June 1655 the General Court ordered that in case any man should strike another person in the General Court, he should either be fined 10 pounds or whipped as the court saw meet. 1 Rec. Col. R. I. 321. This provision does not appear in the Laws and Acts of Her Majesties Colony of Rhode Island, and Providence Plantations Made from the First Settlement in 1636 to 1705 or in later collected laws.

D. *Failure of Jurors to Attend Court.*

1. The Code of Laws adopted by the first General Assembly of Providence Plantations in 1647, under the

heading "Touching the Inquest or Tryars", provided that jurors chosen by the towns and summoned by the town sergeants to the "Colonie Court of Tryall" who failed to appear and those jurors chosen *de circumstantibus* who refused to serve should forfeit 5 shillings, 10 pence or what they might have received if they had attended the service, which the court should determine. 1 Rec. Col. R. I. 199. (*Cf.* The Proceedings of the First General Assembly of "The Incorporation of Providence Plantations" and The Code of Laws adopted by That Assembly in 1647 (ed. W. R. Staples, 1847), p 57, where the forfeiture is given as 5 shillings, 8 pence).

2. In May, 1657 the General Court of Commissioners ordered and declared that any person chosen to serve on an inquest or jury should not be fined for non-attendance unless given three days notice. A talesman refusing to serve was to be subject to a 10 shilling fine. 1 Rec. Col. R. I. 358.

3. In November, 1658, upon motion to increase the amount of fines imposed upon non-appearing jurors and to give a portion of such fines to those serving in place of the defaulters, the General Court of Commissioners ordered no change in the amount of the fines but that one-half thereof be paid out to those serving in place of the defaulting persons Id., pp. 399-400.

4. The following appears in the May 12, 1663 proceedings of the General Court of Commissioners:

> "This Court having taken into serious consideration the intollarable delayes that the Court of Trialls are from time to time put upon, which lies as a great opression upon the Collony, by reson of the non-apearance of jury men; and that because

the fines already sett are so small that it is to ther great advantage to pay the fine and stay at home.

"Therefore be it enacted, that in case any juror, being chosen by the towne or townes, neglect to apeare at the Generall Court of Trialles; being called, he shall be liable to pay a fine of twentye shillinges in currant pay of this Collony; which, if not payd forthwith, shall be taken by distraynt by the Sheriffe as formerly, only in case any lawfull excuse shall apeare manifest to the present Court, wheare they should have apeared, then it shall be in the power of the Court, according to the wayt thereof, to lessen the fine to tenn shillings, five shillings, or nothinge, any lawes to the contrary formerly made, notwithstanding." Id. pp. 501-02. It was further enacted that any towns refusing or neglecting to chose qualified grand and petty jurymen and return their names to the General Court was to pay a fine of 20 shillings for each juryman not chosen. Id., pp. 502-03.

5. Following receipt of the colony charter from Charles II, the General Assembly ordered that Courts of Trial be held each year at Providence and at Warwick, with six jurors provided from each town at such courts. Jurors not appearing were to be fined 10 shillings or under, at the discretion of the courts. 2 id. 31.

6. At the General Assembly held October 28, 1677, there was a substantial re-enactment of the enactment of May 12, 1663 (*supra*). This appears at p. 51 of Laws and Acts of Her Majesties Colony of Rhode-Island, and Providence-Plantations, Made from the First Settlement in 1636 to 1705.

7. At the General Assembly of May 6, 1702, the

amount of the fine for non-appearing jurors was reduced to 13 shillings, 4 pence current money of the colony. Id., p. 98; 3 Rec. Col. R. I. 447.

8. An act passed May 4, 1715, designed to increase the number of petit jurors available at the General Court of Trials and General Gaol Delivery, provided that any juryman chosen under the act who refused and neglected to appear was to pay as a fine 13 shillings, 4 pence unless the court thought fit to remit the same. Acts and Laws, of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 74 (1719).

9. In May 1726 the General Assembly passed An Act for Raising of Jurors Fines. After a recital that, "Whereas Jurors Fines are so low that when Men of any Interest or Estate are Chosen Jurors, they refuse and neglect to appear; whereby the Courts are very much retarded in their Business, and some times it causes very slender Juries," it enacted that every juror chosen to serve on a jury at the General Court of Trials who refused or neglected to attend was to be fined 30 shillings; each talesman returned by the sheriff or his deputy neglecting or refusing to serve was to pay a 10 shilling fine. Acts and Laws of His Majesty's Colony of Rhode Island, and Providence-Plantations, in America, p. 142 (1730).

10. In 1729 it was enacted that any person chosen to serve as a juror in any Inferior Court of Common Pleas refusing or neglecting to serve thereon should be fined the sum of 30 shillings, to be recovered in the manner accustomed in the General Court of Trials. Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in America, p. 208 (1730). The

same provision appeared in the collected laws of 1745. Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New-England, in America, p. 147 (1745).

11. An act passed May 14, 1742, raised the fine to five pounds money for all jurors, both grand and petty, who failed to appear at the court for which chosen, when legally chosen and notified; talesmen taken up by the sheriff or his deputy and refusing to serve were each to pay a fine of 30 shillings money. Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New England, in America, p. 247 (1745).

12. An August 1747 act commenced with the following preamble:

"WHEREAS the Fines imposed by Law on Persons elected by the several Towns to serve as Jurors, in the Courts of this Colony, are so very low and small, that the greater Part of such as are so chosen, neglect to give their Attendance; and the like often happens from the same Cause, where the Sheriff or his Deputy returns Persons to serve on the Jury, as Tales-men. Moreover, it many Times happens, that the Towns elect such to serve on the Jury, as are by Law exempted therefrom; by Means of the Matters and Things aforesaid, Courts are oftentimes retarded in the Pursuit of their Business, and the Parties at Difference greatly suffer, by long and unnecessary Attendance, both of themselves and Witnesses; which is a great Grievance." The amount of the fine was accordingly raised to 16 pounds current money for all jurors chosen in any town to serve as a petit jury at any court, either Superior or

Inferior, and not appearing; the fine for a talesmen was raised to 3 pounds current money. One-third of such fines were for the use of the court, one-third to the use of the sheriff, and one-third to the person serving in place of the delinquent. Acts and Laws of His Majesty's Colony of Rhode-Island, and Providence-Plantations in New-England, In America. From Anno 1745, to Anno 1752, pp. 35-36 (1752). A 1749 act subjected additional jurors summoned by the sheriff upon warrant from a court to the same penalties for delinquency as those drawn out of a box. Rhode Island Session Laws, 1749-50, p. 26. By a 1753 amendatory law fines were to be divided between the sheriff and the General Treasury. Rhode Island Session Laws, 1752-53, pp. 82-83.

13. A June 1762 additional act increased to 40 pounds old tenor the fine for jurors not serving at either of the courts of the colony who were drawn out of the box or returned by the sheriff upon a warrant issued by either court for returning jurors when need be; the fine for a talesman refusing to serve was increased to 8 pounds old tenor. Rhode Island Session Laws, 1761-1763, p. 127.

14. The collected laws of 1767 provided that any person chosen in a town for service on a grand or petit jury in any court and neglecting to appear on notice or return by the sheriff on a writ of venire facias issued by any court in a particular cause was to forfeit as a fine 30 shillings; the fine of a talesman for not attending when returned was set at 6 shillings. Acts and Laws of His Majesty's Colony of Rhode-Island, and Providence-Plantations in New England, in America, pp. 159-60 (1767). This act continued in effect after Rhode

Island became a state, as did all the other colonial acts in effect at the date of independence, unless specifically repealed or amended.

15. A May, 1768 act empowering the Superior Court of Judicature, Court of Assize and General Gaol Delivery to hold a special court for the trial of certain British naval officers, committed for a supposed murder, provided that any juror, grand or petit, returned by the sheriff refusing or neglecting to serve was to be liable to the same fines as jurymen in any courts of the colony. Rhode Island Session Laws, 1768-1769, pp. 10-11.

16. A March 1776 act for erecting a maritime court to try captured British vessels provided that town-sergeants or constables neglecting or refusing to obey warrants for the return of jurors were to be fined not exceeding 10 pounds lawful money; jurors chosen and failing or refusing to serve were to be fined not exceeding 40 shillings lawful money; the fines were to be recovered by distress as in the Inferior Courts of Common Pleas. Rhode Island Session Laws, 1775-76, pp. 316-17.

17. An act of June 1777, amending an earlier act authorizing the justices of the Superior Court of Judicature to hold a special court for the trial of offenders against the United States and the State of Rhode Island and Providence Plantations, provided that jurors returned by the sheriff pursuant to a writ of venire facias were to be subject to the same fine for delinquency as jurors chosen by towns. Rhode Island Session Laws, June 1777, pp. 30-31.

18. A July 1780 act for establishing a Court of Ad-

miralty provided that jurors drawn from the towns in the county in which the court was held who failed to serve were to be liable to the same penalties and forfeitures as jurors drawn to serve at the Inferior Courts of Common Pleas. Rhode Island Session Laws, July (2nd Sess.) 1780, pp. 10-11.

19. An October 1780 act providing for the drawing of jurors from certain towns to attend an adjourned session of the Superior Court of Judicature at Newport further provided that such jurors be subject to the same penalty for non-attendance as was prescribed by law. Rhode Island Session Laws, October, 1780, p. 9.

20. A January, 1795 act authorized the several courts of the State to impose and levy upon jurors returned to such courts such fine or fines not exceeding 5 dollars, as they might think proper, for any absences or neglects which such jurors might be guilty of during the terms of such courts. Rhode Island Session Laws, January 1795, p. 23.

21. A 1798 act, applicable to the Supreme Judicial Court, the Court of Common Pleas and General Sessions of the Peace, provided for fines not exceeding $5 for any juror, grand or petit, neglecting to appear when chosen. Public Laws of the State of Rhode-Island and Providence Plantations, pp. 180, 185. (1798).

22. In 1752 it was enacted that any person returned a juror to serve on an inquisition on a dead body who refused or neglected to serve was to be fined 5 pounds, to be levied by distress. Rhode Island Session Laws, 1752, p. 47. The fine was reduced to 10 shillings in the 1767 collected laws. Acts and Laws of The English Colony of Rhode-Island and Providence-Plantations,

in New-England, in America, p. 32 (1767). The fine was raised to $10 in the 1798 digest. Public Laws of the State of Rhode-Island and Providence-Plantations, p. 399 (1798).

E. *Failure of Witnesses to Appear or Testify.*

1. The General Assembly in October 1650, ordering that "all lawes concerning testimonies shall be of force", ordered further that, "if there are any that can give any substantiall witness or testimonie and shall refuse to attend the subpoena; and proved against him, he shall forfeit five pounds." 1 Rec. Col. R. I. 232. This provision does not appear in the Laws and Acts of Her Majesties Colony of Rhode Island, and Providence-Plantations Made from The First Settlement in 1636 to 1705 or in later collected laws.

2. The collected laws of 1719 provided that in prosecutions for retailing strong liquor without a license, any assistant, justice of the peace or warden might require evidences to give their engagement to testify and, if they refused, to commit them until they purged themselves by such engagement. Acts and Laws, of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 11 (1719). This proviso appeared in substantially the same form in the 1730 collected laws (Acts and Laws, of His Majesty's Colony of Rhode Island, and Providence-Plantations, in America, p. 179 (1730) and in the 1745 collected laws (Acts and Laws, of His Majesty's Colony of Rhode Island, and Providence Plantations, in New-England, in America, p. 124 (1745)). The provision was omitted from the act contained in the 1767 collected laws (Acts and Laws of the

English Colony of Rhode-Island and Providence-Plantations, In New-England, in America, pp. 169-70 (1767)).

3. An Act to prevent Stage-Plays, and other Theatrical Entertainments within the Colony, passed in August 1762, contained a provision for calling spectators as witnesses in prosecutions under the act; any person so called and refusing to give evidence was to be committed to jail without bail or mainprize until they gave evidence and were discharged by court order. Rhode Island Session Laws, 1761-63, p. 152. This act appears in the collected laws of 1767. Acts and Laws of the English Colony of Rhode-Island and Providence-Plantations, in New England, in America, pp. 242-43 (1767). It was repealed in October, 1794. Rhode Island Sessions Laws, October, 1794, p. 10.

4. An Act prescribing the Forms of Writs, and the Manner of Serving them, contained in the 1798 digest, provided that a witness not appearing according to the tenor of his summons, having no reasonable let or hindrance to the contrary, was to be liable to the action of the aggrieved party for all damages sustained in consequence of such default; in addition the court or justice of the peace was given power to bring such witness into court by writ of attachment and to fine him not exceeding $20 and the costs of such attachment and to commit him to prison until such fine and costs were paid. Public Laws of the State of Rhode-Island and Providence Plantations 194, p. 206 (1798).

F. *Failure to Assist Court Officers.*

1. In 1655 the General Court ordered that any person refusing assistance to an officer gathering rates or tak-

ing fines was to forfeit 10 shillings; any person refusing to assist an officer, when so commanded, in case of a breach of the peace or the apprehension of felonious persons was to answer the mischief that might ensue for want of his assistance. 1 Rec. Col. R. I. 306.

2. A law enacted at a General Assembly of May 4, 1698 provided that any person refusing to give aid and assistance to a constable, when lawfully commanded thereto, was to be fined 10 shillings upon application by the constable to the head officer of the town. Laws and Acts of Her Majesties Colony of Rhode Island, and Providence Plantations Made from The First Settlement in 1636 to 1705, p. 79.

3. In the 1719 collected laws it was provided that any person who refused to give aid or duly assist any assistant, justice of the peace or constable in the due execution of their respective offices, when thereunto lawfully required, and duly convicted thereof before any assistant, justice of the peace, etc. should pay as a fine 10 shillings to the town treasury where the offense was committed. Acts and Laws of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 42 (1719). This act is marked repealed in the 1730 collected laws. Acts and Laws, of His Majesty's Colony of Rhode Island, and Providence-Plantations, in America, p. 38 (1730).

4. In the 1798 digest, in An Act to prevent Routs, Riots and Tumultuous Assemblies, and the evil Consequences Thereof, it was provided that any person refusing or neglecting to afford the assistance commanded by any justice, sheriff, deputy-sheriff, town sergeant or constable and convicted thereof upon the oath of the officer so commanding, or other legal evidence, should

forfeit and pay not less than $7, nor more than $30, to be recovered before the Supreme Judicial Court, or any Court of General Sessions of the Peace, according to the aggravation of the offense. Public Laws of the State of Rhode-Island and Providence-Plantations, p. 583 (1798).

5. A person refusing to assist an assistant, justice of the peace or warden in the execution of their duties in cases of forcible entry or detainer were subject to a penalty of 20 shillings, to be recovered by suit or information before any one assistant, justice of the peace or warden for the use of the town where the forcible entry or detainer was committed. Acts and Laws, of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 6 (1719).

6. The same provision as above appears in An Act directing the Proceedings against Forceable Entry and Detainer in the collected laws of 1730. Acts and Laws of His Majesty's Colony of Rhode-Island, and Providence-Plantations in America, p. 176 (1730). It was continued in the collected laws of 1745 (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New England, in America, p. 122 (1745), but in the collected laws of 1767 the penalty was reduced to 10 shillings. Acts and Laws of the English Colony of Rhode-Island and Providence-Plantations, in New-England in America, p. 128 (1767).

G. *Refusal to Serve as Court Officers.*

1. In 1649 the General Court ordered that assistants refusing to serve after being chosen were to forfeit 5 pounds. 1 Rec. Col. R. I. 218.

2. In 1655 the General Court provided that every Commissioner failing to appear at the General Court or departing without leave was to lose his allowance and also forfeit 6 shillings per day of absence. 1 Rec. Col. R. I. 307.

3. In March 1655-6 a Court of Commissioners ordered that, "forasmuch as it appears to be offensive for a magistrate to rise off the bench when a cause comes to be pleaded, for that thereby he prejudgeth the case, and forestalls the mindes of some more or less of the number in the jury, and thereby doth hazard the best and most just cause", that "if any magistrate shall from henceforth, in any of our Courts, uppon the proposinge and pleadinge a cause there before them, rise off the Bench without leave of the Court, he shall be liable to pay five pounds, in case the cause dependinge be layde a hundred pounds or under; and in case it be laide above a hundred pounds, then to pay a tenn pounde fine; those fines to be taken by a distringas from the General Recorder." 1 Rec. Col. R. I. 333-334.

4. A General Court of May 1661 ordered that if any General Officer (including the General Recorder, the General Sergeant, the General Attorney and the General Solicitor) be chosen and refuse to serve, he was to pay a fine of 5 pounds, to be taken by distraint from the General Recorder if not paid. 1 Rec. Col. R. I. 440.

5. At the May 3, 1665 General Assembly it was enacted that:

> "Whereas very great inconveniancyes attend upon the refusing to searve by such as are chosen

to searve in the place of Constable, Towne Sargant or others constituted to exicute warrants or writts in speciall occasions, which refusing, doth evidently tend to the ruin of the government for want of execution of the law, and it is a high contempt of authority.

"Be it therefore enacted by this present Assembly and the authority thereof, that if any man thats chosen to the place of Constable or Towne Sargant, by the towne where he dwelles, or is required by a magistrate, and constituted in extraordinary case to suply the place of Constable, where a Constable is not neare, and doth refuse to searve, and give his engagement to perform the service; hee and every such shall be liable to pay a fine of five pound sterling to the Gennerall Treasury, being thereof convicted by his peeres, and be bound over to the Gennerall Court of Trialles, in a bond of twenty pounds, to answer his contempt; . . . and alsoe who refuseth to ayd a Constable being thereto required shall undergoe the same penalty as hee that refuseth to searve as Constable aforesaid, and be alsoe bound over to the said Court to answer the contempt." [2 Rec. Col. R. I. 118-19.]

6. In the 1719 collected laws it was provided that whoever was elected constable and refused to serve was to pay as a fine the sum of three pounds, six shillings and eight pence to be paid into the town treasury, and if not paid, to be taken by distraint. Acts and Laws, of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 23 (1719). While this law is ascribed to 1666, the 1666 proceedings of the General Assembly and the 1636-1705 compilation of laws make no reference to it.

7. The provision in the 1719 collected laws was re-

enacted in the 1730 collected laws (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in America, pp. 16-17 (1730)) and in the 1745 collected laws (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New England, in America, p. 10 (1745)). In the 1767 collected laws the amount of the fine was changed to 30 shillings. Acts and Laws of the English Colony of Rhode-Island and Providence-Plantations, in New England, in America, p. 87 (1767).

8. At the May 6, 1702 General Assembly it was enacted that any person chosen to the office of Town Sergeant in any town who refused or neglected to serve in said office should forfeit the sum of two pounds current money; if the fine was not paid, the person so refusing was to be committed to jail until he gave good security to answer his contempt at the next General Court of Trials. 3 Rec. Col. R. I. 446-47; Laws and Acts of Her Majesties Colony of Rhode-Island, and Providence-Plantations Made from The First Settlement in 1636 to 1705, p. 52.

9. In the collected laws of 1719 it was provided that a person duly elected to the office of Town Sergeant and refusing to serve was to pay a fine of 40 shillings into the town treasury, to be taken by distraint if not paid. Acts and Laws, of His Majesties Colony of Rhode-Island, and Providence-Plantations in America, p. 23 (1719). While this law was ascribed to 1666, the 1666 proceedings of the General Assembly and the 1636-1705 compilation of laws made no reference to it.

10. The provision in the 1719 collected laws was reenacted in the 1730 collected laws (Acts and Laws, of

His Majesty's Colony of Rhode Island, and Providence-Plantations, in America, p. 17 (1730); in the 1745 collected laws (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New England, In America, p. 10 (1745)); and in the 1767 collected laws (Acts and Laws of The English Colony of Rhode-Island and Providence-Plantations, in New England, in America, pp. 87-88 (1767)).

H. *Failure to Perform Official Duties.*

1. Since the charter provided that no General Court of Trials could be accounted a full court unless the governor and/or the deputy governor and at least six assistants were present, the General Assembly in October 1664 ordered that every assistant absent from court should be liable to a fine of £ 5 sterling, to be sued for by the General Attorney in case of neglect of payment. 2 Rec. Col. R. I. 64-65.

2. On September 4, 1666 the General Assembly ordered that if any magistrate, officer or deputy neglected to attend the "Collony Courts of Tryall" at the time and place appointed, unless excused, or depart the court during its sitting without its leave, they should forfeit double what they would otherwise have received for their service, namely, 6 shillings per day for every day during the sitting of the court, subject to abatement as the court saw fit. The General Recorder was to issue out warrants to the General Sergeant to levy and take by distraint of each delinquent the sum adjudged under the peril of contempt of authority and under the penalty of forfeiting double the value. 2 Rec. Col. R. I. 168-69, 171.

3. Neither of the above laws or orders are contained in the collected Laws and Acts of Her Majesties Colony of Rhode Island and Providence Plantation made from The First Settlement in 1636 to 1705 or in any later collected laws.

4. The General Court in 1651 added to the law concerning the office of General Sargeant a provision that if such officer wilfully neglected the prosecution of any warrant belonging to him, he was to forfeit to the party wronged the damage thereby occuring. 1 Rec. Col. R. I. 238. This provision does not appear in the Laws and Acts of Her Majesties Colony of Rhode Island, and Providence-Plantations Made From The First Settlement in 1636 to 1705 or in later collected laws.

5. The 1719 collected laws provided that any sheriff failing to duly execute a warrant from an assistant, justice or warden in a case of forcible entry or detainer was to forfeit the sum of 20 pounds lawful money, to be recovered by bill, information, suit or complaint in any court of record. Acts and Laws, of His Majesties Colony of Rhode-Island and Providence-Plantations in America, p. 6 (1719).

6. The same provision was included in An Act directing the Proceedings against Forceable Entry and Detainer contained in the collected laws of 1730. Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in America, p. 177 (1730). It was continued in the collected laws of 1745 (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New England, in America, p. 123 (1745), but in the collected laws of 1767 the forfeiture was reduced to 5 pounds (Acts and Laws of the

English Colony of Rhode-Island and Providence-Plantations, in New-England, in America, p. 129 (1767)).

7. The forfeiture provision was omitted in the act contained in the 1798 digest. Public Laws of the State of Rhode-Island and Providence-Plantations, p. 252 (1798).

I. *Failure to Comply with Process.*

1. An Act Directing the Process upon Writs of Habeas Corpus contained in the 1798 Digest provided that if any officer or person to whom a writ of habeas corpus was directed should refuse to receive the same, or after receipt thereof, should refuse or neglect such obedience thereto as the act required, he was to forfeit to the party aggrieved the sum of $100. Public Laws of the State of Rhode-Island and Providence Plantations, p. 236 (1798).

J. *Refusal to Produce Documents or Answer Interrogatories.*

1. A February 1768 act provided that any person refusing to appear before commissioners of bankruptcy or to answer interrogatories was to enter into a recognizance to appear at the next term of the Superior Court; upon refusal to enter into recognizance such person might be committed to jail until the court met; the court was authorized to continue the person so committed in jail or to release him, as the matter might require. Rhode Island Sessions Laws, 1767-68, pp. 74-75.

2. By a 1797 act, included in the 1798 digest, the Supreme Judicial Court was given the power where a

party under subpoena refused to produce partnership books or papers to render a nonsuit against a plaintiff refusing to produce or a default judgment against a defendant refusing to produce or, if the case was pending in another court, to commit the person refusing to gaol until they complied with the order or were duly discharged according to law. id., pp. 159-60.

3. An act in the 1798 digest provided, as to the Courts of Probate, that if any person suspected or complained of having concealed, embezzled or conveyed away any personal estate left by any testator or intestate should refuse to be examined, or to answer interrogatories upon oath respecting such estate, the Court was empowered to commit such person to gaol until they consented to be examined or to answer such interrogatories or were released by consent of the complainant or the order of the Supreme Judicial Court. Public Laws of the State of Rhode-Island and Providence-Plantations, p. 301 (1798).

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court.*

1. For the most part fines imposed upon jurors for failure to attend court when chosen or summoned were not entered in the court records of the colony. For scattered entries in the General Court of Trials and in the Inferior Courts of Common Pleas, largely following the statutory pattern, see Ms. Rhode Island Colony Records, Vol. 1, Part I (Rhode Island State Archives, Providence, Rhode Island), pp. 130, 134, 153, 158-59, 172, 173; id., Vol. 1, Part II, pp. 266, 268, 277, 286, 291,

296, 299, 301, 308, 312, 320, 327; Ms. Court Records: Andros Period, 1687-1689 (Rhode Island State Archives, Providence, Rhode Island), pp. 9, 14, 26, 32, 34; 3 Rec. Col. R. I. 233 (6s., 8d and 13s, 4d for non-appearance; 6s, 8d. for grand jurors refusing to take oath at General Quarter Sessions); Ms. General Court of Trials Rec., 1671-1715 (Office of Clerk, Superior Court, Newport, Rhode Island), pp. 45, 52, 55 (all 20 shillings), 62, 70, 82, 87 (all 6s., 8d), 105, 110, 111, 112, 114, 122 (from 5 to 13 shillings). Some remissions of 20 shilling fines by the General Court appear in 2 Rec. Col. R. I. 339, 385, 395-96, 480-81, 509-10, 525; 3 id. 82.

B. *Refusal to Serve as Court Officers.*

1. An act of Assembly of 1706 allowing a tardy review of a 1701 judgment of the General Court of Trials involved an action brought by one Resolved Waterman against Thomas Whipple, as Special Sergeant, for an alleged wrongful distraint of a 20 shilling fine for refusal to serve as Town Sergeant of Providence. 3 Rec. Col. R. I. 569.

IV. Extension of Laws of England to Colony or State

1. A 1701 act (An Act for the putting in execution the laws of England in this Collony, where no provision be made by the Acts of this Collony) provided that "where the laws of this Collony or custom shall not reach or comprehend any matter, cause or causes, that it shall be lawfull to put in execution the laws of England, etc.; any Act or Acts to the contrary notwithstanding." 3 Rec. Col. R.I. 425; Laws and Acts of Her Majesties Colony of Rhode-Island, and Providence

Plantations Made from the First Settlement in 1636 to 1705, p. 89.

2. In a December 5, 1708 letter to the Board of Trade Governor Samuel Cranston referred to the General Court of Trials as the court at which all actional and criminal causes happening in the colony were tried "where the laws of England are approved of, and pleaded to all intents and purposes, without it be in some particular acts for the prudential affairs of the colony, and not repugnant to the laws of England." 4 Rec. Col. R.I. 57.

3. In the collected laws of 1719 it was provided "that in all Actions, Matters, Causes and Things whatsoever, where no Particular Law of this Colony is made to Decide and Determine the same; that then and in all such Cases the Laws of England shall be put in Force to Issue, Determine and Decide the same. Any Usage, Custom or Law to the contrary hereof notwithstanding." Acts and Laws, of His Majesties Colony of Rhode Island, and Providence-Plantations in America, p. 45 (1719).

4. The same provision was contained in the collected laws of 1730 (Acts and Laws, of His Majesty's Colony of Rhode Island, and Providence-Plantations, in America, p. 42 (1730)), and in the collected laws of 1745 (Acts and Laws, of His Majesty's Colony of Rhode-Island, and Providence-Plantations, in New-England, in America, p. 28 (1745).

5. In the 1767 collected laws an Act regulating sundry Proceedings in the several Courts of the Colony provided *inter alia* that "in all Actions, Causes, Matters and Things, whatsoever, where there is no particular Law of

this Colony, or Act of Parliament introduced, for the Decision and Determination of the same, then and in such Cases the laws of England shall be in force for the Decision and Determination of the same". Acts and Laws of the English Colony of Rhode Island and Providence Plantations, in New England, in America, p. 56 (1767).

6. There is no statutory or constitutional reception provision for the State of Rhode Island.

V. Contempt Cases Arising Under Common Law or Usage

1. One Job Tyler was accused by two witnesses of slighting the authorities when the sergeant came to summon him in saying "he cared not a turd for all their warrants"; he was adjudged at a Quarter Session Court to be whipped until his back be bloody. Ms. Rhode Island Colony Rec., Vol. 1, Part I, p. 23 (Newport 1643).

2. One Thomas Greene of Warwick "having spoken contemptuous words in and to the General Court of Trials and refusing to make his acknowledgement" was bound in the sum of 10 pounds sterling to answer at the next court and to be of peaceful behavior in the meantime (General Court of Trials, Warwick, June 30, 1657). Ms. Rhode Island Colony Rec., Vol. 1, Part I, p. 117.

3. One Richard Griffin was committed to the custody of the General Sergeant during the sitting of the General Court of Trials since until he was committed the court could not sit in quiet "notwithstanding all fayre persuasion to restrain him" (General Court of Trials, Providence, October 13, 1657). Id., p. 119.

4. One Henry Hobson, indicted by the Attorney General at the instance of the General Court of Trials for refusing to appear at a court held in Providence on October 13, 1657 according to summons, pleaded not guilty and put himself on God and his country; a guilty verdict being returned, Hobson was bound in the sum of 5 pounds to the peace and for his good behavior. Id., p. 121 (Court of Trials, Providence, March 9, 1658).

5. For being drunk in court, acknowledged offense and fined 5 shillings (General Court of Trials, Portsmouth, Oct. 11, 1659). Id., p. 145.

6. One Leach, being called before the General Court of Trials, contemtuously expressed himself against the governor and also the court in general and "alsoe by the motiones of his body behave himselfe soe unseemly which gave the Court just offense"; he was accordingly bound in the sum of 40 pounds to appear at the next court and in the meantime to be of good behavior (General Court of Trials, Newport, May 10, 1669). Ms. Rhode Island Colony Rec., Vol. 1, Part II, p. 307.

7. One Jacob Hokens, having contemptuously refused to aid some constables, was told by the General Court of Trials that he would have to get sureties for his good behavior and answer for his contempt at the next court; Hokens stating that he would not be at the next Court, for this contempt he was committed to custody or prison until he gave security for his good behavior until the next court took further order therein (General Court of Trials, Newport, October 20, 1669).

8. One Uselton, having been ordered to leave the colony be the General Court of Trials, contrary to the order publicly appeared in Newport while the General

Assembly was sitting; called before the General Assembly in June 1671, to answer for his contempt, he was again ordered to leave the colony; as he was going out of the Court Uselton turned back, and "did publickly in the Court jeere the authority in a scornefull manner" with many scornful, contemptuous carriages. For this misdemeanor and contempt he was accordingly sentenced to be whipped with 15 stripes, and ordered to depart the colony on penalty of being severely whipped by order of any two magistrates if he returned thereto. 2 Col. Rec. R.I. 392.

9. One William Newman, although warned to leave the colony by the General Assembly and the General Court of Trials, remaining in Portsmouth, the General Assembly in 1671 ordered that he depart the colony within ten days under penalty of being severely whipped with 15 stripes by order of any magistrate if he returned (except to Westerly where he owned lands). 2 Rec. Col. R.I. 394.

10. In 1681 one Christopher Almy, indicted for misbehavior, refused to plead in the General Court of Trials but "in the most contemptuous upbraiding manner abused the King's authority and officers saying that he was as good a man as the best of them Their places only excepted"; he was ordered to make a humble acknowledgment as to his "misbehauvour" and pay fees or else pay a fine of 5 pounds. Ms. General Court of Trials Rec., 1671-1715, p. 58 (Office of Clerk, Superior Court, Newport, R.I.).

11. In July 1684 one Thomas Gould was brought before the Governor and Counsel to answer for not complying with a sentence of the late General Court of

Trials by "satisfying the charges of the Constables and aid"; examined concerning the same in the presence of the Assembly, instead of giving a submissive answer, he misbehaved in a contemptuous manner to the Court and its members and departed without leave; the Assembly ordered that a recent act for Gould's enlargement be repealed and he be left in the General Sergeant's custody to perform the sentence of the Court. 3 Rec. Col. R.I. 155, 163.

12. In three instances in 1688 misbehavior in the presence of an Inferior Court of Common Pleas resulted in fines of 3s., 4d. and in one of these the giving of a bond for good behavior. Ms. General Court of Trials Rec., 1671-1715, pp. 101, 110.

13. In one instance the General Court of Trials in 1688 imposed a fine of 20 shillings for failure to appear before an Inferior Court of Common Pleas when called. Id., p. 107.

14. One Thomas Starr having misbehaved in the presence of the court of General Quarter Sessions, held at Newport during the Andros period, submitted to the court and was fined 3 shillings, 4 pence. Ms. Court Records, 1687-89, p. 21 (June 12, 1688).

15. One John West, for misbehavior in the Inferior Court of Common Pleas at Newport, was fined 3 shillings, 4 pence. Id., p. 30 (Dec. 12, 1688).

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I. Judicial Establishment

In the proprietary period (until 1719) the only significant court of civil jurisdiction was the Court of Pleas (sometimes referred to as the Court of Common Pleas) held at Charleston. The only significant courts exercising criminal jurisdiction were at first the Sheriff's Court and later (c. 1700) the General Court of Sessions, both held in Charleston. In the early years of the royal province a General Court with original jurisdiction in both civil and criminal matters was held at Charleston. County and Precinct Courts, subordinate to the General Court, at times called courts of pleas, assize and gaol delivery, with civil and criminal original jurisdiction, were established on a territorial basis in 1721. However, for most of the period of royal rule and into the post-Revolutionary era a Court of Common Pleas at Charleston was the principal court

of original jurisdiction in civil matters and a Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery, also held at Charleston, was the principal court of criminal jurisdiction. Both were subject to the appellate jurisdiction of the Governor and Council. Commencing in 1789 the judicial system was reorganized to provide for various circuit courts on a district basis with civil and criminal original jurisdiction and to provide for the abolition of the county courts and the Court of Common Pleas and the Court of General Sessions of the Peace at Charleston. Research was limited to the few extant records of the Court of Common Pleas and the Court of General Sessions for Charleston.

II. Colony and State Acts Relating to Contempt

A. *Misconduct in Presence of Court*

1. A 1721 act establishing various courts of pleas, assize and gaol delivery in various countries and precincts (An Act for Establishing County and Precinct Courts, No. 473) provided that the courts erected should have power to fine all persons for misbehavior in court, in amounts not exceeding the sum of 20 pounds, and to commit such persons to prison until they paid the same. Statutes at Large of South Carolina, Vol. 7, p. 171 (ed. David J. McCord, 1840). This provision is marked "Obsolete" in Grimké, The Public Laws of the State of South Carolina p. 116 (1790).

2. A 1731 act (An Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries by Ballot, in this Province, and for the Better Administration of Justice in Criminal Causes, No. 530) pro-

vided that if any person committed any misbehavior or contempt in the Court of General Sessions of the Peace or the Court of Common Pleas at Charlestown, or in any other court of judicature in the province, by word or gesture, it should be lawful for the judges of every such court to set a fine on such offender, in any sum not exceeding 10 pounds proclamation money, and to commit the offender until payment. If any person should in the face and during the sitting of any such court so far forget the reverence and regard due to his Majesty's authority as to strike or use any violence in such court, then every such person so offending was to be fined at the discretion of the court and committed until payment. Id., Vol. 3, p. 283 (ed. Thomas Cooper, 1838). This provision continued in effect until at least 1800. See Grimké, Public Laws of the State of South Carolina, p. 129 (1790); State v. Johnson, 1 Brevard's Rep. 155 (1802).

B. *Failure of Jurors to Attend Court*

1. A 1706 Act provided for a 40 shilling fine for any juror not appearing when summoned to a coroner's inquest. Statutes at Large of South Carolina, Vol. 2, pp. 270-71.

2. A 1721 act (An Act for Establishing County and Precinct Courts, No. 473) provided that any justice, juror, coroner or constable not appearing at any court of pleas, assize or gaol delivery established in various counties and precincts was to be fined 5 pounds to be levied on his goods and chattels unless a satisfactory reason for absence was given. Id., Vol. 7, p. 170. This fine for justices of the peace was eliminated by an addi-

tional act of February 23, 1722 (No. 466), apparently because such justices were liable to serve as jurors and subject to fines for non-attendance in that capacity. Id., Vol. 7, p. 183.

3. A 1731 act (An Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries by Ballot, in this Province, and for the Better Administration of Justice in Criminal Causes, No. 530) provided that if any juror neglected or refused to appear in the Court of General Sessions of the Peace or the Court of Common Pleas at Charleston or, after appearing, refused to act or absented himself without leave of the court, it would be lawful for the Chief Justice to fine such juror in the sum of 40 shillings proclamation money and issues unless good and sufficient cause were shown. The forfeitures were to be levied by distress and sale of the offender's goods or by attachment of the body of the offender. Id., Vol. 3, p. 278.

4. A 1734 act (An Act for the Better Regulating the Courts of Justice in the Province, and for Altering the Time of Holding Courts, No. 583) provided that jurors neglecting to appear or refusing to serve in any court of record were to be fined not exceeding 3 pounds proclamation money "in issues to be levied" unless reasonable excuse were shown. Id., Vol. 7, p. 187.

5. A 1740 act (An Act to Prevent the Delay of Justice by the Non Appearance of Grand and Petit Jurors at the Courts of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery, No. 667) after reciting the great inconveniences and the delay of justice by persons neglecting to appear as grand jurors at the courts of general sessions of the peace,

due in great measure to the smallness of the fines imposed, provided that any grand juror, not appearing or refusing to act or absenting himself without court leave was to be fined not less than 5 pounds nor more than 10 pounds proclamation money and that petty jurors in such courts so defaulting were to be fined 5 pounds proclamation money if without sufficient excuse. The clerks were authorized to publish a list of defaulters in the South Carolina Gazette. Id., Vol. 3, pp. 554-55. This act remained in effect until at least 1790. Grimké, Public Laws of the State of South Carolina, pp. 162-63 (1790).

6. A 1744 act (No. 713) applicable to the courts of common pleas provided a fine of 5 pounds proclamation money for defaulting jurors unless good and sufficient excuse were made. The list of defaulters was to be published in the South Carolina Gazette. Id., Vol. 3, pp. 631-32.

7. An August 1779 ordinance provided that any grand juror in any court of justice neglecting or refusing to appear and act might be fined 500 pounds current money unless sufficient excuse were made and that petty jurors so defaulting could be fined 250 pounds current money unless sufficient excuse were made. Id., Vol. 4, p. 484. This ordinance appears in Grimké, Public Laws of the State of South Carolina, p. 302 (1790).

8. A 1791 act provided that grand or special jurors neglecting or refusing to appear and act in any district court were liable to fines of 10 pounds sterling and petit jurors so defaulting to fines of 5 pounds sterling. Statutes at Large of South Carolina, Vol. 7, p. 273. By a 1798 act the fine for grand jurors was altered to $30 and

5% of the amount of the general state taxes paid by them in the previous year and for petit jurors to $20 and the same 5% provision. Id., Vol. 7, p. 287. A 1799 statute made the fine for all jurors $20 and 7% of the amount of the general state taxes paid by the defaulter in the previous year. Id., Vol. 7, p. 291.

C. *Failure of Witnesses to Appear or Testify*

1. A 1706 act provided for a 40 shilling fine for witnesses not appearing at a coroner's inquest without reasonable excuse. Statutes at Large of South Carolina, Vol. 2, p. 271.

2. An act of December 12, 1712 (No. 322) made applicable to the province certain acts of Parliament including 5 Elizabeth I, c. 9 (An Act for Punishment of such as shall procure or commit any wilful Perjury). Section XII of this act provided that if any person served by process to testify or depose in any matter or cause in any court of record did not appear, having no lawful or reasonable excuse, the party making default was to forfeit for each such offense £ 10 and to yield such further recompense to the party grieved as by the discretion of the judge should be awarded, according to the loss sustained by reason of the non-appearance of the said witness, such several sums to be recovered by the party so grieved against the offender by action of debt, bill, plaint or information in any court of record. Id., Vol. 2, pp. 488-89.

3. A 1721 act (No. 473) provided that every witness not appearing at a county or precinct court, being duly served with a subpoena in a civil cause, or upon appearance refusing to answer the questions proposed by the

court, should forfeit to the party by whom subpoenaed 20 pounds current money to be recovered by action of debt in any county or precinct court in which such witness resided. Further, if any witness in any criminal cause (not bound over by recognizance to appear) should refuse or neglect to appear on service of subpoena, or appearing should refuse to answer, he should be fined by the court any sum not exceeding 20 pounds current money, and stand committed until he paid the same. Witnesses subpoenaed to appear at the general court of pleas or general sessions at Charleston, and neglecting to appear, or appearing and refusing to answer, were to be under the same penalties and forfeitures. Id., Vol. 7, p. 170.

4. A 1731 act (No. 530) provided that any person summoned to give evidence at the Court of General Sessions neglecting to appear was to forfeit the sum of 10 pounds proclamation money with such damages as should accrue to the summoning party. If any person so summoned or bound over by recognizance to give evidence appeared and refused to give evidence, it was lawful for the court to set a fine upon such offender not exceeding 100 pounds proclamation money to the use of the King and to commit the offender until payment was made, together with the lawful fees of such commitment. Provided, however, that in the case of treason, felony or other capital offense for which the offender if convicted would be subject to the death penalty, a witness refusing or neglecting to appear or to give evidence was to be dealt with "according to the order of the common law." Statutes at Large of South Carolina, Vol. 3, p. 283 (ed. Thomas Cooper, 1838). This provision con-

tinued in effect until at least 1800, see Grimké, Public Laws of the State of South Carolina, p. 123 (1790); State v. Johnson, 1 Brevard's Rep. 155 (1802).

5. A 1785 act (No. 1281) provided that any witness failing to appear at a county court after having been summoned to appear should be fined by the court for "contempt", and in addition, should be liable for all damages sustained by the party aggrieved by such non-appearance unless the witness showed sufficient excuse for his non-appearance. Statutes at Large of South Carolina, Vol. 7, p. 219.

D. *Refusal to Serve as Court Officers*

1. A 1740 act (No. 667) provided that any person neglecting or refusing to serve as constable was to forfeit 10 pounds upon due conviction, one-half to the King and one-half to the person prosecuting and suing. Statutes at Large of South Carolina, Vol. 3, p. 555.

2. A 1768 act (No. 980) provided that any person refusing to execute the office of sheriff was to forfeit 100 pounds proclamation money. Id., Vol. 7, p. 201.

E. *Failure to Perform Official Duties*

1. A 1706 act (No. 250) provided a 40 shilling fine for any constable failing to return a warrant to summon jurors to a coroner's inquest. Statutes at Large of South Carolina, Vol. 2, pp. 270-71.

2. A 1731 act (No. 530) provided that if the treasurer or coroner of Berkley County neglected or refused to give due attendance to draw and impound a jury upon notice and summons from the Chief Justice, he was to forfeit 10 pounds proclamation money for the recovery

of which the Chief Justice might issue an attachment as for a contempt or disobedience of a rule of court. Id., Vol. 3, p. 280.

3. The same 1731 act (No. 530) also provided that if the provost marshal failed to summon any persons named in any writ of *venire facias,* the Chief Justice was to fine the offender not exceeding 40 shillings proclamation money to be recovered by warrant of distress and sale of goods. Id., Vol. 3, p. 280.

4. An ordinance of August 31, 1779 (No. 1127) provided that if any judge, sheriff or clerk neglected to draw or cause to be drawn proper jurors to serve at any court of justice, they were to forfeit 1000 pounds current money, one-half to the State and one-half to the informer, to be recovered by an action of debt in any court of common pleas. Id., Vol. 4, p. 484.

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court*

1. For non-attendance by juror; fined 5 pounds proclamation money. Later, defaulter appeared and fine discharged. Ms. Judgment Book, 1763-1769, Court of Common Pleas, Charleston, p. 20. (This volume and the other manuscript court records referred to below are located at the South Carolina Dept. Archives, Columbia, South Carolina.)

2. For non-attendance by 8 jurors; each defaulter fined 5 pounds proclamation money. Id., pp. 191, 315.

3. For non-attendance without sufficient excuse by 11 grand jurors and 10 petit jurors; each defaulter fined 10 pounds proclamation money. Ms. Judgment Book,

1769-1776, Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery, Charleston (November 1773), p. 264.

4. For non-attendance by 5 grand jurors and 5 petit jurors; each defaulter fined 10 pounds proclamation money. Id., p. 277.

5. For non-attendance by 2 grand jurors and 6 petit jurors; each fined 10 pounds proclamation money. Id., p. 302.

6. For non-attendance by 5 grand jurors and 9 petit jurors; each defaulter fined 10 pounds proclamation money. Id., p. 318.

7. For non-appearance by 11 persons chosen as jurors for the Court of Common Pleas in Charleston; Orangeburgh District of South Carolina; unless good and sufficient excuse was shown under oath, each person to be fined 5 pounds proclamation money. South Carolina Gazette, August 13, 1772.

8. For non-appearance by 6 grand jurors and 8 petit jurors at a Court of General Sessions of the Peace, Oyer and Terminer, Assize, and General Gaol Delivery at Charleston; unless good and sufficient excuse was shown under oath, each grand juror to be fined 10 pounds proclamation money and each petit juror 5 pounds proclamation money. South Carolina Gazette, October 22, 1772.

9. For non-appearance by 3 grand jurors and 11 petit jurors at a Court of General Sessions of the Peace, Oyer and Terminer, Assize, and General Gaol Delivery for the Orangeburg District of South Carolina; unless good and sufficient excuse was made under oath for such defaults, each grand juror to be fined 10 pounds proclamation money and each petit juror 5 pounds proclama-

tion money. South Carolina Gazette, November 26, 1772.

10. For non-appearance by 5 grand jurors and 16 petit jurors at the Assizes in the Ninety Six District of the Southern Circuit, and for non-appearance by 8 grand jurors and 21 petit jurors at the Assizes in the Beaufort District of the Southern Circuit; unless good and sufficient excuse was shown under oath, each grand juror was to be fined 10 pounds proclamation money and each petit juror 5 pounds proclamation money. South Carolina Gazette, December 17, 1772.

11. For non-appearance by 2 grand jurors and 10 petit jurors at a Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery of the Camden District of the Northern Circuit; unless good and sufficient excuse was shown under oath, each grand juror was to be fined 10 pounds proclamation money and each petit juror 5 pounds proclamation money. South Carolina Gazette, December 17, 1772.

B. *Failure of Witnesses to Appear or Testify*

1. For having failed to appear as a witness after having been duly subpoenaed to appear; defaulter ordered to show cause why an attachment should not issue against him. Ms. Judgment Book, 1763-1769, Court of Common Pleas, Charleston (August 1764) p. 55.

IV. Extension of Laws of England to Colony or State

1. A May 22, 1698 commission from the Lords Proprietors of the Province of Carolina to Edmund Bohun as Chief Justice "of that part of our Province of Carolina that lyes South and West of Cape Fear" authorized

him "to have hold and Determine all Pleas as well Civil as Criminal, and those relating to the publique Revenues and all other pleas whatever arising and happening within the said part of our Province of Carolina" with full power and authority to do perform and execute all matters and things whatsoever which to his office appertained "in as large and ample manner to all intent and purpose as any Justice or Baron of any of the Courts of Westminster or any of the English Plantations in America may or ought to perform and execute." Records in the British Public Record Office Relating to South Carolina, 1698-1700 (ed. A. S. Salley, 1946) pp. 47-48.

2. An act of 1712 (An Act to Put in Force in this Province the Several Statutes of the Kingdom of England or South Britain, Therein Particularly Mentioned, No. 322) provided, in Section V thereof, that all and every part of the Common Law of England, when not altered by certain enumerated acts of Parliament, or inconsistent with the particular constitutions, customs and laws of the Province (except so much as related to the ancient tenures abolished by Statute 12 Car. II, c. 24 and that part relating to matters ecclesiastical which was inconsistent or repugnant to the settlement of the Church of England in the province) be in as full force and virtue in the province as within the Kingdom of England. It also provided that the Governor and Council, constituting a Court of Chancery, have power to put into execution so much of the common law as the Lord Chancellor or Lord Keeper of the Great Seal might do in England and that the Chief Justice of the province might put into execution so much of the common law

as any of the Justices or Judges of any of the Courts of Queen's Bench and Common Pleas, or Barons of the Exchequer, or Commissioners of Oyer and Terminer and Gaol Delivery might do in England. Statutes at Large of South Carolina, Vol. 2, pp. 413-14. In Section XIV the above paragraph was somewhat qualified by a provision that the act should not be construed or extended to alter the usual course of proceedings in the several courts of judicature in the province and various acts of Assembly relating to juries and regulating proceedings of courts in the provinces; particularly named was an Act to provide Indifferent Jurymen in all Causes Civil and Criminal of Jan. 7, 1694-5 and several additional acts thereto; no copies have been found of these acts. Id., Vol. 2, pp. 415-16.

3. A 1731 act (No. 530) establishing a Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery at Charlestown provided that the court was to have and exercise all the powers, jurisdictions and authorities in all causes or matters capital or criminal arising within the province, in as full and ample a manner to all intents and purposes whatsoever, as any judges or justices of the court of King's Bench, justices of assizes, justices of oyer and terminer and gaol delivery, or any court of general and quarter sessions of the peace could or might lawfully hold, exercise and enjoy in the Kingdom of England. Id., Vol. 3, pp. 282-83.

4. A 1737 act (An Act for the Better Regulating the Court of Common Pleas, No. 622) provided that the said court and the justices thereof should have and exercise all and singular the powers, jurisdictions and authorities in all civil causes within the province, in as

full and ample manner, to all intents and purposes whatsoever, as the court of Common Pleas at Westminster, and the justices thereof could or lawfully might have used, exercised and enjoyed. Id., Vol. 7, p. 190.

5. The South Carolina Constitution of 1778, Article 34 (Id., Vol. 1, pp. 137, 144) provided:

> "That the resolutions of the late Congress of this State, and all laws now of force here (and not hereby altered) shall so continue until altered or repealed by the legislature of this State * * *."

6. The Constitution of 1790, in Article 7 (Id., Vol. 1, pp. 184, 190), provided that:

> "All laws of force in this State at the passing of this constitution, shall so continue, until altered or repealed by the legislature * * *."

V. Contempt Cases Arising Under Common Law or Usage

1. In May, 1723, one Richard Shelton of Charleston, on behalf of most of the inhabitants thereof, petitioned the Lords Commissioners for Trade and Plantations to repeal a statute passed on June 23, 1722, entitled "An Act for the better Government of Charles Town." The petition stated that at the very first court in Charleston, jurors were summoned without the 20 days notice required by law, and that eleven non-appearing jurors were fined 20 pounds together with 3 pounds for court costs, although the law authorized a fine of not more than 5 pounds. The petition also recited that, contrary to law and practice, the court proceeded to make up a grand jury by a tales de circumstantibus and a petit jury for criminal matters by a tales. The petition sought repeal of the statute and that the money

extorted for the fines and fees be returned. Records in the British Public Record Office Relating to South Carolina, Vol. 10, 1723, pp. 82-86. South Carolina Archives Dept., Columbia, S.C. The act was disallowed by the King in Council. Statutes at Large of South Carolina, Vol. 3, p. 179.

2. For having insulted a grand jury which refused to return an indictment for assault against another person; ordered imprisoned until further order of the court. Two days later, upon apology to the court, defendant was ordered discharged upon payment of fees. Ms. Judgment Book, 1769-1776, Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery, Charleston (January 23 and 25, 1771), pp. 102, 107.

3. For constable's having reprimanded two other constables and for having falsely told them that he had been sent by the court to so act; ordered that defendant's name be struck from the lists of constables of Charleston. Eleven days later, upon apology to the court, it was ordered that defendant be re-appointed constable of Charleston. Id. (January 31 and February 11, 1771), pp. 114, 115.

4. For failure of constable to attend court; constable excused by the court upon the merits of his affidavit. Id. (October 1772) p. 210.

5. For an unspecified contempt; Clement Sempricia appeared in court pursuant to the rule issued, and after having declared that he had intended no contempt to the court, but his conduct proceeded from want of information, the court ordered him to be discharged, paying fees. Id. (May 2, 1776), p. 345.

6. For constable's having obstructed the Clerk of the Court of Common Pleas in executing certain orders given him by the provost marshal; ordered to show cause why an attachment should not issue against him. Ms. Judgment Book, 1763-1769, Court of Common Pleas, Charleston (August 1764), p. 54.

7. For having prevented the surrendering of a defendant out on bail; provost marshal ordered to take offender into custody. Id. (November 1764), p. 69.

8. For failure of provost marshal to make return on a writ of attachment; ordered to show cause why a writ of attachment should not issue against him. Id., p. 104.

9. In the November, 1765 term of the Court of Common Pleas at Charleston, the Chief Justice being of the opinion that no business could be proceeded with until stamped paper was procured according to the Stamp Act, the court was adjourned. When the court met again on March 4, 1766 the attorney for plaintiff in *Jordan* v. *Law* moved the court to judgment but a ruling was postponed. On April 1 the Assistant Justices declared it their opinion that judgment be ordered in the usual manner, since no stamp paper was to be had; the Chief Justice delivered his opinion that no business should go on until the Stamp Act was complied with. Dougal Campbell, the clerk, being called to enter the order of judgment begged leave to decline and offered reasons which were disallowed. William Mason was then appointed clerk by the court and directed to enter the order of judgment which was done. An entry was made in the court records that, "The said Dougal Campbell from Particular tenderness and indulgence on account of his Hitherto dutiful and deligent behavior in

office not being proceeded against with that strictness which his disobedience upon the present occasion merited; a piece of Indulgence which the court will by no means hereafter suffer to be drawn into precedent." Id., pp. 109-10. At the May 1766 term the court considered Campbell's late conduct in refusing to enter a judgment in Jordan v. Law and in not issuing a venire for summoning a jury for the present court and fined him 100 pounds proclamation money to be paid within 10 days for his contempt. Id., pp. 120-21. Campbell thereupon petitioned the court for tenderness and compassion claiming he was unable to pay that amount; the fine was accordingly reduced to 10 pounds proclamation money, the court "believing his conduct stemmed from error in judgment rather than contempt." Id. (May 29, 1766), p. 124. At the February 1767 term a letter from Robert Walpole, for the Lords of the Committee of Council for Plantation Affairs was read, remitting the fine imposed upon Campbell. Id., p. 176. Cf. the account in Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Revised, 1963), pp. 226-27.

10. For the taking by two justices of the peace of a prisoner from the custody of a deputy marshal; ordered that attachments issue against the justices of the peace unless they showed sufficient cause for their actions. Ms. Judgment Book, 1763-1769. Court of Common Pleas, Charleston (July 1, 1766), p. 125.

11. For having forced a deputy of the Charleston District Court of Common Pleas to eat four copies of writs which he was attempting to serve on the defendant (the deputy being offered the alternative of "eating four copies of the writs, or being instantly put to

death"), a Revolutionary War hero named Colonial Hezekiah Maham out on bail did not appear, but his counsel confessed the indictment and Judge Aedemas Burke sentenced him to three months imprisonment, fined him 100 pounds, and bound him to good behavior for 7 years (Maham in 2000 pounds and two securities in 1000 pounds each). Senate Files of South Carolina, Petition of Judge Aedamas Burke to Senate, 1786, Legal System, Petitions, 1786 (Maham had petitioned the legislature charging the judges of the Charleston District Court of Common Pleas with cruelty and oppression, excessive bail, fine and imprisonment, and Burke sought to advise the Senate of the true circumstances surrounding Col. Maham's claim.) Later, the governor remitted the imprisonment, Senate Journal, Jan. 10, 1786-Mar. 22, 1786, p. 118, and the Senate and House of Representatives passed resolutions remitting the fine and dissolving the recognizance. House of Representatives Journal, Jan. 10, 1786-March 22, 1786, p. 127. The resolutions, however, commended the action of the judges in the case.

12. For having accused a justice of the peace with gross partiality and abuse of power; justice of peace ordered contemnor imprisoned. On appeal, the South Carolina Constitutional Court of Appeals affirmed the "power of a magistrate to commit for insults or contempts" offered in the presence of the court. The court stated, "And one general principal, incidental to all courts, as well superior as inferior, was power to commit for contempts, either by word or deed, offered in the presence of the judge, and in the face of such court. And this is not against *magna charta,* or the law of the

land, but forms a part of the common law, which is recognized by the terms of our Constitution. 5 Vin-tit. Contempts, 447. Lill. Pract. Reg. 305. Gilb. Hist. C.B. 20, 21. 2 Hawk. 96. 112, 113." The court, by way of dicta, said that contempts committed out of the presence of the court "ought to" be prosecuted by indictment. *Lining* v. *Bentham*, 2 Bay's Reports 1 (1796).

13. In *Gist* v. *Bowman*, 2 Bay's Reports 182 (1798), the court held that a defendant, in custody of the sheriff under an attachment for contempt for having failed to put in an answer to a bill of discovery filed in an equity court, was not entitled to discharge from custody on a writ of habeas corpus before common law judges. The court said that under the Habeas Corpus Act the common law judges had no authority to liberate men committed for contempts.

VIRGINIA

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I. Judicial Establishment

By 1645 the judicial establishment consisted of (1) County Courts with limited civil and criminal jurisdiction, (2) Quarter Courts, held at James City, by the governor and council, exercising original jurisdiction, civil and criminal, and appellate jurisdiction over the County Courts, and (3) the General Assembly exercis-

ing appellate jurisdiction over the Quarter Courts. In March 1661-2 the name of "Quarter Courts" was changed to "General Court." During the colonial period the General Court continued to be the principal court of judicature in the colony. In the early part of the eighteenth century the right of appeal to the King in Council from judgments of the General Court was recognized and the General Assembly ceased to exercise an appellate function. Following the Revolution, the General Court, with a new statutory basis, continued as the principal court of judicature. In 1788 District Courts were established as "superior courts" to be held by the judges of the General Court in various designated districts with broad original jurisdiction. The County Courts continued to exercise limited original jurisdiction. A Court of Appeals with appellate jurisdiction over the General Court, a High Court of Chancery and a Court of Admiralty was established in 1778. Since virtually all the records of the General Court were destroyed in the Civil War, research was limited to representative County Courts—Accomac-Northampton for the period of early settlement and York and Norfolk for the 18th century.

II. Colony and State Acts Relating to Contempt

A. *Defamation or Abuse of Court Officials*

1. A 1676-7 statute provided that anyone who uttered or wrote mutinous or contemptuous words about a justice of the peace, or who abused or scandalized such a justice, and being thereof lawfully convicted, was to be whipped 20 lashes or ordered to pay 400 pounds of tobacco; and, for a third offense, he was to be whipped

39 lashes and stand in the pillory for two hours, or pay a double fine. All fines were distributed one half to the informer and one half to the county where the offender resided. Statutes at Large Virginia (ed. W. W. Hening, 1823), Vol. 2, pp. 385-386. If the above conduct was directed at the Council, the penalty was 24 lashes or 600 pounds of tobacco and cask; if directed at the governor, the penalty was 30 lashes or 800 pounds of tobacco and cask. This act was repealed by Proclamation, July 6, 1680.

2. A 1680 statute provided that anyone who wrote or spoke to incite dislike of or to defame judges, principal officers or councillors was to be imprisoned for 3 months without bail or mainprize and fined 100 pounds. Id., Vol. 2, pp. 463-464. If the conduct was directed toward the governor, the penalty was one years' imprisonment without bail or mainprize and a fine of 500 pounds. This act, covered under the heading of "Sedition" in at least one abridgement, was in force throughout the colonial period. Acts of Assembly Now in Force in the Colony of Virginia, pp. 8-11 (1769).

B. *Misconduct in Court*

1. Several acts between 1745 and 1761 provided that nothing included therein should hinder the justices of county or inferior courts from compelling any attorney practicing therein to find security for good behavior or from imposing fines for misdemeanors or contempts against justices. Statutes at Large Virginia, Vol. 5, pp. 347-348; id., Vol. 6, p. 142; id., Vol. 7, p. 399; Acts of Assembly Now in Force in the Colony of Virginia, pp. 376-79 (1769).

C. Failure of Jurors to Attend Court

1. A 1677 statute authorized fines of 200 pounds of tobacco, one half to the informer and one half to the use of the county, for failure either of grand jurors to appear before justices of the peace at county courts or for failure to make presentments. Statutes at Large Virginia, Vol. 2, pp. 407-408.

2. A 1705 statute authorized fines of 200 pounds of tobacco for failure of grand jurors to appear for impanelling in county courts, thus preventing an impanelling; forfeiture of 400 pounds of tobacco for failure of grand jurors in the General Court to appear when summoned to be recovered by action of debt, etc. in any court of record; and fines of 400 pounds of tobacco for failure of petit jurors to appear for impanelling in the General and County Courts. Id., Vol. 3, pp. 368-369. A 1748 statute authorized fines of 400 pounds of tobacco for non-appearance at the General or County Courts by both grand or petit jurors, provided in the case of the County Courts that no grand jury could be impanelled. Id., Vol. 5, pp. 523-525.

3. A 1734 statute provided for fines not exceeding 400 pounds of tobacco for failure of grand and petit jurors to appear for duty in the courts of oyer and terminer. Id., Vol. 4, pp. 403-404. These provisions were re-enacted in 1748. Id., Vol. 5, pp. 543-544; Mercer, An Exact Abridgement of the Public Acts of Assembly of Virginia in Force and Use January 1, 1758, p. 218 (1759).

4. A 1777 statute provided for a fine not exceeding 5 pounds for non-attendance by grand jurors at the courts of oyer and terminer. Statutes at Large Vir-

ginia, Vol. 9, p. 307. This act does not appear in A Collection of all such acts of the General Assembly of Virginia, of a public and permanent nature, as are now in Force (1794).

5. Another 1777 statute provided for fines not to exceed 400 pounds of tobacco for non-attendance at the General Court by grand jurors; and for fines not exceeding 40 shillings or 400 pounds of tobacco for non-attendance at such court by petit jurors. Statutes at Large Virginia, Vol. 9, pp. 416-417. This act also does not appear in the 1794 collection of acts in force, supra.

6. A 1788 statute provided that any juror guilty of any contempt to a District Court was to be fined not more than 10 pounds. Any grand juror failing to attend was to be fined not exceeding 400 pounds of tobacco. Id., Vol. 12, pp. 746, 758.

7. A 1792 act provided that grand jurors summoned and failing to appear in the District Courts or in the quarterly sessions of the County Courts or of corporation courts were to be fined not exceeding $8, unless good cause were shown. The same fine was provided in the case of non-attending petit jurors in such courts. It was also provided that any juror guilty of a contempt to the court might be fined by such court in any sum not exceeding $30. Stat. at Large Virginia (New Series; ed. S. Shepherd, 1835), Vol. 1, pp. 18-19.

D. *Failure of Witnesses to Appear or Testify*

1. A March 1660/61 act provided for fines of 1000 pounds of tobacco for non-attendance by witnesses at the Quarter Courts and 350 pounds of tobacco for non-attendance at the County Courts. Statutes At Large

Virginia, Vol. 2, pp. 23-24. These provisions were reenacted in March 1661/2 with the Quarter Courts redesignated "General Courts." Id., Vol. 2, p. 69.

2. A 1662 statute provided that a witness who refused to give evidence under oath was to be committed to prison until he gave the requisite evidence. Id., Vol. 2, pp. 167-68. This law does not appear in An Abridgement of the Publick Laws of Virginia in Force and Use, June 10, 1720 (1728) and is marked repealed in An Exact Abridgement of all the Public Acts of Assembly of Virginia, in Force and Use (1738).

3. A 1696 statute, repealing the March 1661/2 act, provided that witnesses who failed to appear at the General Court, including those who failed to appear to give depositions, were subject to fines of 1000 pounds of tobacco and were liable to pay all damages as given by the common law to the party injured for want of such evidence; and failure to attend County Courts subjected the witnesses to fines of 350 pounds of tobacco. Statutes at Large Virginia, Vol. 3, pp. 144-145.

4. A 1705 statute provided that witnesses who failed to appear at the General Court were to forfeit and pay to the aggrieved party 1000 pounds of tobacco, to be recovered, with costs, in an action of debt in any court of record. Id., Vol. 3, p. 298.

5. A 1748 Act, disallowed by the King in Council in 1752, provided for a fine of 1000 pounds of tobacco on a non-attending witness, to be paid to the party for whom the witness was summoned, and made such defaulter liable to the action of the summoning party at common law for his damages. Id., Vol. 5, pp. 467, 480. The same provision appeared in a 1753 act. Id., Vol. 6,

p. 338. In a 1777 act the fine was made 5 pounds or 1,000 pounds of tobacco. Id., Vol. 9, p. 411. In 1788 the same fine was made applicable to the newly established District Courts. Id., Vol. 12, p. 748.

6. The above 1705 statute (Par. 4) also provided that witnesses refusing to give evidence under oath before the General Court were to be committed to jail without bail or mainprize until they were willing to give evidence as the law directed. This provision was reenacted in substantially the same form in 1748, 1753 and 1777, except that Quakers could affirm and declare. Id., Vol. 5, p. 480; id., Vol. 6, pp. 337-338; id., Vol. 9, p. 411. It was extended to the District Courts in 1788. Id., Vol. 12, p. 748.

7. A 1710 statute provided that failure by a witness to attend a County Court subjected him to a forfeiture of 350 pounds of tobacco, to be recovered by the aggrieved party by action of debt in any court of record, and to liability in an action on the case for damages to such party by such non-attendance. Id., Vol. 3, p. 514.

8. A 1729 statute provided that any witness who failed to attend at a County Court was to forfeit 350 pounds of tobacco to the person who summoned him (judgment to be granted upon motion), and was also to be liable in an action upon the case by the party aggrieved for whatever damages were sustained for want of such testimony. Id., Vol. 4, pp. 193-94.

9. A 1748 statute provided that any witness who failed to attend any County Court, or upon any survey of land, was to be fined 350 pounds of tobacco to the party at whose suit such summons was issued, and also to be liable to the action of such party at common law

for his damages. Id., Vol. 5, p. 505. This act appears in Acts of Assembly Now in Force, in the Colony of Virginia, p. 177 (1769).

10. A 1792 act (An Act concerning Witnesses, and prescribing the Manner of obtaining and executing Commissions for taking their Depositions in certain Cases) provided that if any person summoned as a witness in any court or to appear before commissioners, referees, etc. or upon an order of survey, should fail to attend, without reasonable excuse, such person should be fined $16 to the use of the party for whom such witness was summoned and be liable to an action of the party for all damages sustained by such non-attendance. The act also provided that if a person so summoned refused to give evidence upon oath or affirmation, he should be committed to prison to remain there without bail or mainprize until he gave such evidence. Stat. at Large Virginia (New Series; ed. S. Shepherd, 1835), Vol. 1, pp. 196-97.

E. *Refusal to Serve as Court Officers*

A 1710 act provided that any person refusing to serve as sheriff was to forfeit 5,000 pounds of tobacco. Statutes at Large Virginia, Vol. 3, pp. 500-01. By an act of 1720 the forfeiture was reduced to 3,000 pounds. Id., Vol. 4, pp. 84-85. In 1748 the forfeiture was made 20 pounds current money to be recovered, with costs, by action of debt or information in any court of record. Id., Vol. 5, p. 516. In 1782 the amount was changed to 50 pounds. Id., Vol. 11, p. 169.

F. *Failure to Perform Official Duties*

1. Statutes enacted in 1647 and in March 1661/2 authorized fines of 300 pounds of tobacco for unexcused

absences at the county courts by commissio..ers. Statutes at Large Virginia, Vol. 1, p. 350; id., Vol. 2, pp. 70-71. No such provision appears in the 1748 Act for Establishing County Courts, and for regulating and settling the Proceedings therein. Id., Vol. 5, p. 489.

2. A March 1657/8 act provided that every sheriff failing to make sufficient return of any warrant or precept directed to and received by him was to forfeit 1000 pounds of tobacco. Id., Vol. 1, p. 452.

3. By statute of March 1661/2 a sheriff who failed to make sufficient return of process in civil actions in the General Court and the County Courts was to be amerced 1000 pounds of tobacco, one half to the plaintiff suing for it and the other half to the county. Id., Vol. 2, p. 78.

4. A 1705 act, re-enacted in substance in 1748, provided that any sheriff who failed to make due return of all writs and other process directed to him was to forfeit 1000 pounds of tobacco, one moiety to the crown and the other to the party aggrieved, to be recovered with costs by action of debt, etc., in any court of record. The sheriff was liable further to an action for damages at common law by the party aggrieved by such failure. Id., Vol. 3, p. 248; id., Vol. 5, p. 517.

5. A 1705 law provided forfeitures of 1000 pounds of tobacco for sheriff failing to summon a grand jury, to be recovered by action of debt, etc. in any court of record. Id., Vol. 3, p. 168.

6. A 1753 act provided that any sheriff or other officer failing or neglecting to return any writ of execution delivered to him to execute was to be fined at the discretion of the General or County Court not exceeding 10 pounds current money, to the use of the creditors at

whose suit execution issued. Such sheriff or officer was also liable to the action given and the penalty inflicted by the above 1748 act. Id., Vol. 6, p. 344.

7. A 1791 act provided for a fine of 5 pounds per month for each 100 pounds contained in any judgment or decree of the Court of Chancery where the sheriff delayed returning a writ of execution or attachment. Id., Vol. 13, p. 246.

III. Contempt Cases Arising Under Colony and State Acts

A. *Failure of Jurors to Attend Court*

1. For non-appearance at court by seven jurors; five were fined according to law, but were later discharged, and two others were not penalized. Ms. Norfolk County Order Book, June 18, 1742 to Sept. 18, 1748, pp. 60, 66, 235 (County Court, Norfolk County) (Virginia State Library, Richmond, Va.).

2. Four entries appearing in Ms. Norfolk County Order Book, October 16, 1746 to Aug. 17, 1750, show that, for non-appearance at court by six jurors, one was fined 5 pounds (p. 91); another was fined 500 pounds of tobacco and ordered to pay costs and to be committed until the fine and costs were paid (p. 91); and four were each fined 400 pounds of tobacco and ordered to pay costs (pp. 276, 281). Another entry during this period showed that the court had ordered that it be posted that defaulting jurors would be fined according to law (p. 203) (County Court, Norfolk County).

3. For non-appearance at court by four jurors; each fined 400 pounds of tobacco and costs. Id., Sept. 20, 1750 to Oct. 25, 1753, pp. 16, 25 (County Court, Norfolk County).

4. For non-appearance at court by four jurors; each fined 400 pounds of tobacco. Id., Aug. 21, 1759, to Sept. 21, 1759, pp. 39a, 93a (County Court, Norfolk County).

5. For non-appearance at court by nine jurors; each fined 400 pounds of tobacco. Id., April 21, 1763 to Oct. 19, 1765, pp. 150a, 223b, 235a, 263b (County Court, Norfolk County).

6. For non-appearance at court by five jurors; each fined 400 pounds of tobacco. Id., July 21, 1768 to May 17, 1771, p. 131a (County Court, Norfolk County).

7. For non-appearance at court by a number of jurors; six fined 400 pounds of tobacco each, and sheriff ordered to attach other defaulting jurors. Id., June 20, 1771 to Oct. 23, 1773, pp. 30a, 102a, 107a, 192a (County Court, Norfolk County).

8. For non-appearance at court by several jurors; each fined 400 pounds of tobacco. Ms. York County Judgments and Orders, 1772-1774, p. 243 (County Court, York County) (Virginia State Library, Richmond, Va.).

B. *Failure of Witnesses to Appear or Testify*

1. For failure of witness to appear in court after having been summoned to appear; ordered that contemnor be fined according to law. Ms. Norfolk County Order Book, June 18, 1742 to Sept. 18, 1748, p. 59 (County Court, Norfolk County).

2. For non-attendance at court by five witnesses who had been duly summoned to appear; four fined 300 pounds to tobacco each, and one fined 150 pounds of tobacco. Ms. York County Judgments and Orders, 1752-1754, pp. 7, 8, 45, 93. Other entries, which followed

several of these cases, showed that the fine of one witness was confirmed while the fines against other witnesses were set aside for good cause shown (pp. 50, 67) (County Court, York County).

3. For non-appearance at court by witness who had been duly summoned to appear; fined 350 pounds of tobacco unless he appeared at the next court. Ms. Norfolk County Order Book, Oct. 18, 1759 to March 18, 1763, p. 129b (County Court, Norfolk County).

4. For non-appearance at court by witness after having been duly summoned; ordered that an attachment issue against the defendant for contempt. Id., April 21, 1763 to Oct. 19, 1765, p. 263b (County Court, Norfolk County).

5. For non-appearance at court by a witness; fined 350 pounds of tobacco unless he appeared at the next assizes and showed cause for such default. Id., July 21, 1768 to May 17, 1771, p. 251a (County Court, Norfolk County).

6. For non-appearance at court by a witness who had been duly summoned to appear; fined 350 pounds of tobacco unless he appeared at the next court to show cause for such default. Id., June 20, 1771 to Oct. 23, 1773, p. 75b. Later, upon contemnor's subsequent non-appearance, the fine imposed on him became fixed and payable to the aggrieved party in the case, defendant also to pay costs. Id., p. 85a (County Court, Norfolk County).

7. For non-appearance by four witnesses in two civil suits; three each fined 350 pounds of tobacco, unless they appeared at the next court to show cause for such defaults, and the fourth was fined 350 pounds of tobacco.

Id., pp. 100a, 179a, 186b (County Court, Norfolk County).

8. For non-appearance at court by a witness duly summoned to appear; fined 350 pounds of tobacco, payable to the aggrieved party, unless he appeared at the next court for the purpose of showing cause for such default. Ms. York County Judgments and Orders, 1770-1772, p. 42 (County Court, York County).

C. *Failure to Perform Official Duties*

1. For apparent failure of sheriff to summon persons to court; sheriff fined 2189 pounds of tobacco and costs. Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676 (ed. H. R. McIlwaine, 1924), p. 419, (c. 1670); see, similarly, pp. 376, 394, 402, 409, 418, 419, 426, 427, 434, 439 (General Court).

2. For failure of sheriff to pay over a certain amount of money collected as taxes from a precinct in the county for the years 1760 and 1761; private party, on motion, permitted to recover 100 pounds current money from defendant sheriff's bond, but this judgment to be discharged upon payment over by sheriff of the said taxes and costs. Ms. York County Judgments and Orders, 1754-1763, p. 379 (County Court, York County). Similar motions were made and granted against other sheriffs and under-sheriffs for similar defaults, *i.e.*, failure to return executions in civil cases. Id., 1763-1765, pp. 189, 338 (County Court, York County).

3. For failure of several sheriffs to return writs of execution; six judgments entered against sheriffs for the amount of the unreturned writs. Id., 1765-1768, pp. 27, 105, 131 (County Court, York County).

4. For failure of deputy sheriff to pay over the amount of an execution sued out of the court; judgment of recovery against deputy sheriff. Id., 1770-1772, p. 342 (County Court, York County).

5. For failure of sheriff to return a writ of execution; sheriff fined 10 pounds sterling. Id., 1770-1772, p. 342 (County Court, York County).

6. For failure of under-sheriff to pay to the plaintiff in a civil case the amount of a particular execution on defendant's property; ordered that the under-sheriff pay out to plaintiff the amount of the execution. Id., 1772-1774, p. 256 (County Court, York County). A subsequent entry shows another recovery of an unpaid execution, but no fine. Id., p. 402.

7. For failure of sheriff and two deputy sheriffs to return writs of execution in various cases (4 cases); each defendant fined 10 pounds sterling for each such default. Id., 1772-1774, pp. 243, 255 (County Court, York County).

8. For failure by sheriffs to deliver monies collected on executions (3 cases); judgments against sheriffs for the amount of such executions, plus 5% interest. Id. 1774-1784, pp. 24-25, 113, 516 (County Court, York County).

9. For failure of sheriffs and deputy sheriffs to return writs of execution in various cases (12 cases); eight contemnors each fined 10 pounds and four each fined 5 pounds. Id., 1774-1784, pp. 22, 403, 515; id., 1784-1787, pp. 4, 71, 86, 262, 343 (County Court, York County).

IV. Extension of Laws of England to Colony or State

1. The preamble to a body of acts passed at a Grand Assembly held at James City on March 23, 1661/2 stated as follows (Statutes at Large Virginia, Vol. 2, pp. 41-43):

> WHEREAS the late unhappy distractions caused frequent changes in the government of this country, & those produced soe many alterations in the lawes, that the people knew not well what to obey nor the judge what to punish, by which meanes injustice was hardly to bee avoyded, and the just freedome of the people by the incertainty and licentiousness of the laws hardly to be preserved, This assembly takeing the same into their serious consideration, and gravely weighing the obligations they are under to discharge to God, the king and the country, have by settling the laws, diligently endeavored to prevent the like inconveniences by causing the whole body of the laws to be reviewed all unnecessary acts & chiefly such as might keep in memory, our inforced deviation from his majesties obedience, to be repealed, expunged, and those that are in force to be brought into one volume, and least any prejudice might arise by the ignorance of the times from whence those acts were in force, they have added the dates of every act, to the end that courts might rightly administer justice and give sentence according to law for any thing hapning at any time since any law was in force, and have also endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all *due obedience and reverence*, And that the laws made by us are intended by us,

but as breife memorialls of that which the capacity of our courts is utterly *unabled* to collect out of *such* vast volumes, though sometimes perhaps for the difference of our and their condition varying in small things, but far from the presumption of contradicting any thing therein conteyned * * *."

2. The Preface to Jefferson's Reports of Cases Determined in the General Court of Virginia, 1730-1740, 1768-1772 (1829) contains the following passage:

"The general assembly was constituted . . . by letters patent of March the 9th, 1607, in the fourth year of the reign of James the first. The laws of England seem to have been adopted by consent of the settlers, which might easily enough be done whilst they were few and living all together. Of such adoption, however, we have no other proof than their practice till the year 1661, when they were expressly adopted by an act of the assembly, except so far as 'a difference of condition' rendered them inapplicable. Under this adoption, the rule, in our courts of judicature was, that the common Law of England, and the general statutes previous to the fourth of James, were in force here, but no subsequent statutes were, *unless we were named* in them, said the judges and other partisans of the crown, but *named or not named,* said those who reflected freely. It will be unnecessary to attempt a description of the Laws of England, as that may be found in English publications."

3. In May 1776 the Virginia Assembly passed An ordinance to enable the present Magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and

other cases till the same can be more amply provided for. Statutes at Large Virginia, Vol. 9, p. 127. It provided as follows:

> "VI. *And be it further ordained,* That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony."

V. Contempt Cases Arising Under Common Law or Usage

A. *General Contempt*

1. For an unspecified contempt by two persons; after a jury trial, defendants found guilty and ordered to pay fines of 5 shillings each and costs of prosecution, and also ordered into custody until fines and costs were paid (The King v. Ashby and Langley). Ms. Norfolk County Order Book, Nov. 15, 1753 to July 18, 1755, pp. 88b and 92b (County Court, Norfolk County).

B. *Defamation or Abuse of Court or Court Officials*

1. For having abused a constable by threatening to strike him near a church on the Sabbath; ordered to build a pair of stocks and to deliver them and pay all charges. Then for having failed to build and deliver said stocks pursuant to court order, contemnor ordered to pay a fine of 100 weight of tobacco for the use of the parish and to build the stocks by the next court or sit

in those already made during the commander's pleasure. County Court Records of Accomack-Northampton, Virginia, 1632-1640, pp. 71, 72, 78 (American Legal Records—Vol. 7) (County Court, Accomack-Northampton).

2. For having charged the court with injustice, etc.; defendant to remain in custody of the sheriff until he acknowledged his error and to be fined 50 pounds of tobacco. Id., p. 114 (County Court, Accomack-Northampton).

3. For having affronted the court and for having made "contumelious" speeches, apparently against another court; contemnor to pay an unspecified amount of tobacco and to ask forgiveness for his contempt. Id., p. 137 (County Court, Accomack-Northampton).

4. For having offered an indignity to a member of the County Court; upon humble acknowledgment, case dismissed with contemnor paying costs. Ms. Norfolk County Order Book, Nov. 15, 1753 to July 18, 1755, p. 64b (County Court, Norfolk County).

5. For having offered an indignity to the court; ordered that contemnor be taken into custody until he gave security of 50 pounds of tobacco for his good behavior for 2 or 4 months. Ms. Norfolk County Order Book, Aug. 21, 1775 to Sept. 21, 1759, p. 176b (County Court, Norfolk County).

6. For contempt offered to an official in the execution of his office; fined 5 shillings and ordered to pay costs. Ms. Norfolk County Order Book, July 21, 1768 to May 17, 1771, p. 194b (County Court, Norfolk County).

C. *Misconduct in Court*

1. For having sworn at the court; fined 1 shilling. County Court Records of Accomack-Northampton, Virginia, 1632-1640, p. 24 (County Court, Accomack-Northampton).

2. For having been intoxicated in the presence of the court; ordered to sit by heels during the divine service on the next Sabbath. Id., p. 114 (County Court, Accomack-Northampton).

3. For having misbehaved in the presence of two justices; ordered to post security of 200 pounds of tobacco for his good behavior for a year and a day. Ms. Norfolk County Order Book, Sept. 20, 1750 to Oct. 25, 1753, p. 66 (County Court, Norfolk County).

4. For having insulted the King's Attorney in the presence of the court; ordered that contemnor be committed until he posted security in the amount of 30 pounds for his good behavior for 12 months. Ms. Norfolk County Order Book, Oct. 18, 1759 to Mar. 18, 1763, p. 63a (County Court, Norfolk County).

5. For having misbehaved before the court; fined 5 shillings and sheriff ordered to keep defendant in custody until he gave security in the amount of 50 pounds for good behavior for six months, together with costs. Id., May 16, 1766 to June 17, 1768, p. 194a (County Court, Norfolk County).

6. For misbehavior in the presence of a justice; ordered that sheriff take contemnor into custody until he gave bond in the amount of 100 pounds (with 2 sureties of 50 pounds each) for good behavior for 12 months together with costs. Id., July 21, 1768 to May 17, 1771, p. 85b (County Court, Norfolk County).

D. *Failure to Assist Court Officers*

1. For having refused to assist a constable in the execution of his office; ordered that contemnor be summoned to appear at the next court to show cause why an information should not be filed against him. Id., 1752-1754, p. 183 (County Court, York County).

2. For failure of two persons to aid a sheriff in the execution of his office; for such contempt, each person fined 10 shillings and costs. Ms. Norfolk County Order Book, May 16, 1766 to June 17, 1768, p. 43b (County Court, Norfolk County).

E. *Refusal to Serve as Court Officer*

1. For refusal to assume the office of constable, after having been duly appointed thereto; ordered to pay fine of 500 pounds of tobacco and costs. Ms. York County Judgments and Orders, 1746-1752, p. 32 (County Court, York County).

F. *Failure to Perform Official Duties*

1. For failure of guardians of orphans to render their accounts to the court; ordered that attachments for contempt be issued. Ms. York County Judgments and Orders, 1752-1754, p. 105 (County Court, York County).

2. For having failed to appraise an estate of a decedent; for such contempt fined 5 shillings and costs. Ms. Norfolk County Order Book, May 16, 1766 to June 17, 1768, p. 170b (County Court, Norfolk County).

3. For constable's having neglected his office; ordered that defendant be fined 1 shilling, together with costs.

Id., July 21, 1768 to May 17, 1771, p. 181a (County Court, Norfolk County).

G. *Failure to Comply with Process*

1. For having failed to appear in court, after arrest, to answer a writ; defendant to lay his neck and heels at the church door on the next Sabbath, and to remain in Accomack County until the next court to answer the suit. County Court Records of Accomack-Northampton, Virginia, 1632-1640, p. 24 (County Court, Accomack-Northampton).

2. For having failed to appear in court, after arrest, to answer writ; defendant to pay the arrestor (apparently a party to the writ) 50 pounds of tobacco as damages, and to appear at the next court to answer the suit. Id., p. 26 (County Court, Accomack-Northampton).

3. For failure of various offenders to appear in court to answer presentments filed against them by grand juries; one offender fined 15 shillings, others received unspecified fines. Ms. Norfolk County Order Book, Nov. 15, 1753 to July 18, 1755, p. 24 (County Court, Norfolk County).

4. For refusal by three persons to obey a summons in a case instituted by a constable; each fined 20 shillings and ordered to pay costs for such contempt. Id., Oct. 18, 1759 to Nov. 18, 1763, p. 192b (County Court, Norfolk County).

5. For failure of defendant to answer plaintiff's bill; attachment issued against defendant for his contempt. Defendant later appeared, and the suit was settled. York County Judgments and Orders, 1754-1763, p. 323 (County Court, York County).

6. For failure by several defendants to answer the bills of various plaintiffs; attachments issued against defendants for such contempts. Ms. York County Order Book, 1765-1768, pp. 96, 118, 139, 152, 177, 221, 297. In one case, the failure to answer was taken as a confession of judgment and judgment was accordingly entered against defendant (pp. 118, 152).

7. For failure of defendant to answer plaintiff's bill; attachment issued, returnable at next court. Ms. York County Order Book, 1765-1768, p. 384. Later, defendant answered and judgment on merits entered against him, but no fine for earlier contempt (p. 424) (County Court, York County).

8. For resisting a constable in the execution of writ upon defendant's goods; for each contempt, defendant was ordered to pay a fine of 40 shillings and costs. Ms. Norfolk County Order Book, May 16, 1766 to June 17, 1768, p. 51b (County Court, Norfolk County).

9. For having failed to answer plaintiff's bill; for "having stood out all process of contempt and failing to answer, the complaint is taken for confessed." Ms. York County Judgments and Orders, 1768-1770, p. 13. Later entries show a similar confession of judgment. Id., pp. 66, 103 (County Court, York County).

10. For failure of defendant to answer plaintiff's bill; attachment issued and bill taken as confessed by the defendant. Ms. Norfolk County Order Book, July 21, 1768 to May 17, 1771, p. 236b (County Court, Norfolk County).

11. For failure of defendant to answer plaintiffs' bills in several cases; attachments for contempt issued. Ms. York County Judgments and Orders, 1770-1772,

p. 380; id., 1772-1774, pp. 20, 43, 131, 244 (County Court, York County).

12. For having despised His Majesty's warrant; defendant fined 5 pounds for the use of the King, and sheriff ordered to keep him in custody until he gave security in the amount of 100 pounds (with 2 sureties at 50 pounds each) for good behavior for 12 months and a day, and costs. Ms. Norfolk County Order Book, June 20, 1771 to Oct. 23, 1773, p. 190a (County Court, Norfolk County).

H. *Failure to Obey Court Rules or Orders*

1. For having failed to present to the court (presumably in violation of a court order) a list of marriages, christenings and burials; contemnor ordered to pay a fine of 30 pounds of tobacco to the use of the parish. County Court Records of Accomack-Northampton, Virginia, 1632-1640, pp. 78-79 (County Court, Accomack-Northampton).

2. For disobedience by constable of an order from a justice; ordered that constable be removed from office. Ms. Norfolk County Order Book, June 12, 1742 to Sept. 18, 1748, p. 115 (County Court, Norfolk County).

3. For alleged failure to obey court order to work on roads; after a hearing, contemnor found not guilty of contempt by the court and dismissed. Id., p. 239 (County Court, Norfolk County).

4. For having failed to comply with a court order; attachment issued, and after continued refusal to comply with such order, contemnor ordered committed to the custody of the sheriff until he complied with the same, and to pay costs. Ms. York County Judgments

and Orders, 1746-1752, pp. 83, 100 (County Court, York County).

5. For having refused to obey an order of a county magistrate regarding the assisting in conveying certain criminals to jail; for such contempt, contemnors ordered to appear at the next court to answer the complaint and show cause why an information should not be exhibited against them. Id., 1774-1784, p. 114 (County Court, York County).

6. For failure by two defendants to comply with orders of the court (two cases); attachments issued, and sheriff to keep defendants in custody until they complied with the court orders, also to pay costs. Ms. Norfolk Court Order Book, Oct. 18, 1759 to Mar. 18, 1763, pp. 139b, 150a (County Court, Norfolk County).

7. For failure to comply with a former order of the court; for such contempt, contemnor ordered to be kept in custody until he complied with the order and paid court costs. Ms. Norfolk County Order Book, April 21, 1763 to Oct. 19, 1765, p. 23a (County Court, Norfolk County).

8. For contempt of court in operating a particular nuisance (possibly in violation of a court order); fined 5 shillings and costs. Id., p. 143b (County Court, Norfolk County).

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OCT 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 6

AL HARRIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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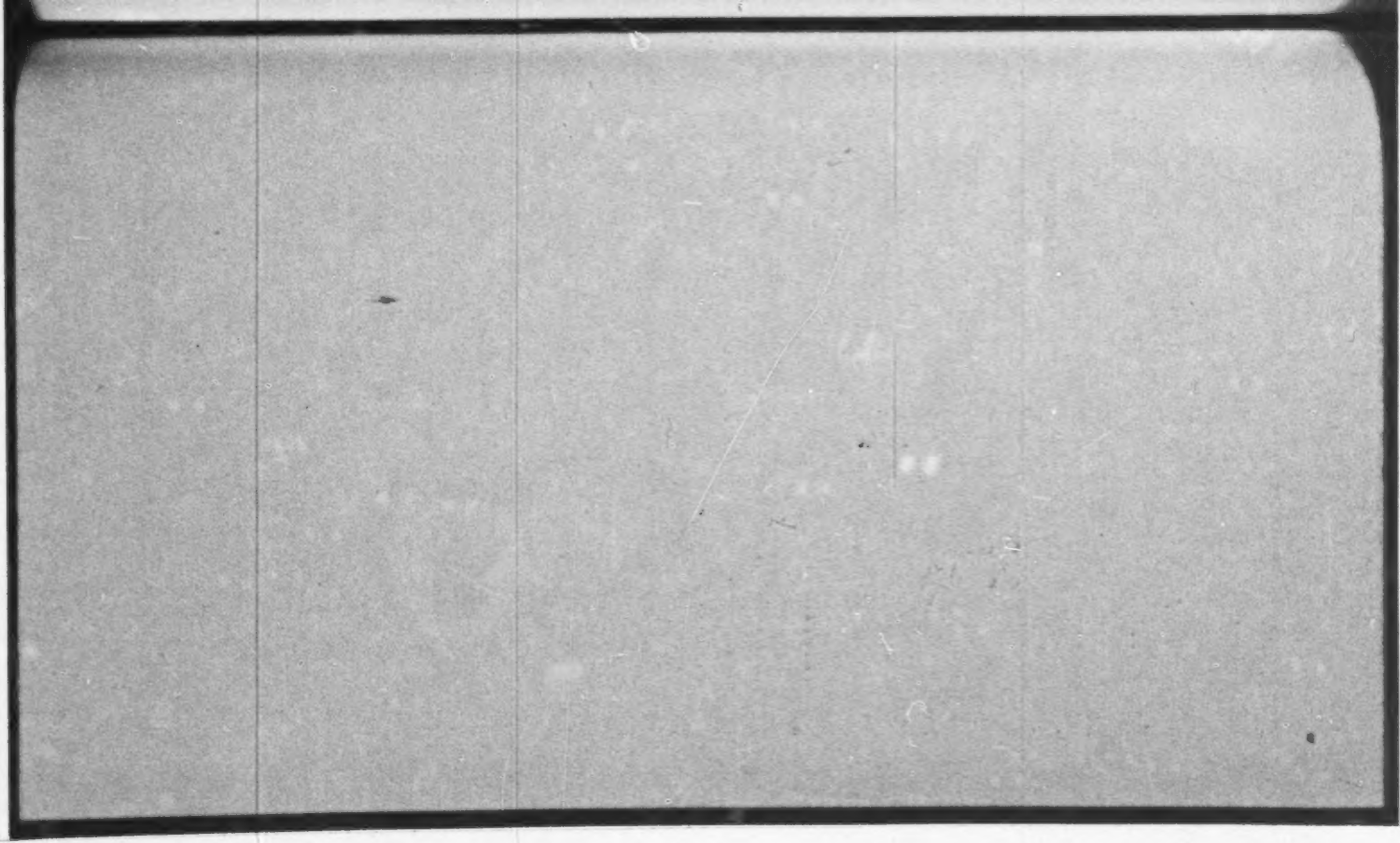

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REPLY BRIEF FOR THE PETITIONER

Petitioner's principal arguments are set forth in full in his Brief. This Reply Brief is devoted to answering several points raised in the Brief for the United States.

1. The government recognizes that the proceedings in the instant case *could* have been pursuant to Rule 42(b).

At page 19 of its brief, the government states: "A
ing as we do that the court could have chosen to pr
under subsection b with regard to petitioner's out-of
contempt, it selected a permissible alternative." Th
ernment is arguing in essence that although Rule 42
proper, the prosecutor and the court in this case ought
able to avoid its clear mandate and use Rule 42(a), r
upon this Court's earlier ruling in *Brown* v. *U. S.* J
Stewart acknowledged in the *Brown* case that Rule
may be a proper alternative. Therefore, this case pos
basic question: is the need for speed so great as to out
the requested procedural protections of the Consti
and of the statute to notice and hearing, especially
sentences that are imposed are severe? This is th
question, and it is urged that this Court rule tha
balance, life in the courts could go on with short dela
that defendants can have reasonable hearings before
are jailed for long periods.

The government in its brief on page 22 states th
the *Levine* case this Court held that the contempt
the contempt in the instant case) was committed i
presence of the court. Petitioner agrees that the adj
tions of contempt were similar in *Levine* and *Harri*
does not agree with the government's interpretation o
Court's ruling in *Levine* that the proceeding wa
open one. Justice Frankfurter's opinion in the *L*
case said that it was *not* a truly open proceeding; bu
the defendent did not object to it at the time. 362 U.
616-619. In the instant case, it was quite clear tha
defendant *did* object to the fact that the proceedings
not public. See Transcript of Record pp. 16, 23, 24, 2
32, 33. The petitioner's counsel and the court an
prosecutor were all well aware that the trial court
proceeding under the rule of the *Brown* and *Levine*
sions, and petitioner's counsel was careful to make p
and timely objections as the *Levine* case suggeste
should.

What occurred in the instant case was exactly what Chief Justice Warren predicted in the *Brown* case would happen should the Government be allowed to convert a Rule 42(b) proceeding into a Rule 42(a) proceeding at will, thus depriving individuals of their constitutional and statutory right to notice and hearing. Agreeing now that petitioner's contempt could have been treated under Rule 42(b), the government argues that the trial court had the right to make petitioner repeat his offense before the court so that the government could suspend petitioner's constitutional rights by proceeding under the more precipitous summary procedures of Rule 42(a). There was no other purpose for this questionable conversion than to sidestep petitioner's procedural protections.

Not only does the government thus urge the defeat of petitioner's constitutional rights at the caprice of the prosecutor or trial judge; it goes on to suggest that such a procedure is really to the petitioner's advantage—whether he likes and wants it or not. For example, on page 23 of the government's brief, it states that there is no reason to believe that the sentence would be harsher in a 42(a) proceeding than in a civil contempt or a Rule 42(b) proceeding. The government thus assumes that the petitioner would have absolutely failed to convince the trial court of any matter in his defense or in extenuation or mitigation, even if there was a full hearing. The government has no right to decide for a defendant how he should proceed, or what is best for him. Yet, this is the gist of the government's argument at page 23 of its brief.

In the instant case, there was a "command performance" in the words of Chief Justice Warren in the *Brown* case—a repeat of a contempt before the Grand Jury in order to convert the proceeding from a Rule 42(b) to a Rule 42(a) proceeding. The government rationalizes this by saying that the court was really being kind to the defendant in trying to use the contempt power as a *coercive* device. This

obviously is not so since petitioner was given a fixed sentence for an alleged consummated wrong. Indeed, in its adjudication, the trial court stated that it was finding petitioner guilty of *criminal* contempt. Record, p. 33. And, the addition of a purge clause does not change a punitive sanction to a coercive one. *Gompers* v. *Bucks Stone & Range Co.*, 221 U.S. 418, at 443.

The government also argues that the record shows that the only real issue before the trial court in the instant case was whether the petitioner had immunity under the Communications Act. Even if this was so, there would have been questions of fact or witnesses upon which such a decision needed to be predicated, and which petitioner could have offered at the Rule 42(b) proceeding. But the petitioner was fobbed-off from his opportunity of stating what issues he was requesting time to prepare for. He asked for the chance to raise other issues and this was denied. Record, p. 32, 33. After that, it is ironical that the government should now say that he had no issues because he only mentioned a few. The fact is that petitioner's counsel asked for a delay to be able to offer more evidence (the nature of which was never fully disclosed because the request was denied) and to advise his client. It is compounding the wrong to the petitioner to argue now that having been stopped from going further in the hearing against his wishes, he should be punished because he did not present evidence which would warrant this Court's now acknowledging that there *were* further issues to be raised.

The government also argues at page 65 of its brief that in a case of disobedience of an order there is not that danger of personal bias on the part of the court with which Rule 42(b) is concerned. Although this is not the case of a wrangling between the court and a contemnor (in which case it would be clear that the judge could not be unpredjudiced) it does not mean that there might not be

a great affront on the part of the particular judge who issued the order. See dissent of Justice Black in *Nilva* v. *U. S.*, 352 U.S. 385 (1957). This is especially so in a case (like this one) where the two had met before, where the proceedings had been dragging on and where the court might well have been angry, impatient, or generally affronted by the alleged recalcitrance of the witness. Was this judge the most dispassionate one to rule on the contempt issue? Under the rule of the *Offutt* case (348 U.S. 11), a judge must disqualify himself if he is "personally embroiled." It may well be that a judge under these circumstances could become so "embroiled" if his order was disobeyed and if petitioner persisted in his legal demands which the court considered ill-founded.

The government argues at page 66 of its brief that much of the justification for punishing the kinds of conduct summarily which are allowed by the statute apply in this case. Apparently the government is seeking a reversal of what is clearly the law. Because although there may be similarities, it is quite clear that the summary contempt power is limited to contempts of the kind where the misconduct is a misbehavior in the presence of the court and not disobedience of a court order. The government says at page 69 that "the importance of being able to punish contempt summarily is not significantly different in the case of a recalcitrant witness than it is in the case of the boisterous or insulting attorney, party, witness, or spectator." But the distinction has been made, and it is based on good sound reasons.

The government argues at page 73 of its brief that looking back it appears that "the judge's principal concern was to compel obedience to his order, not to punish petitioner." This kind of afterthought is hard to understand when in fact the court summarily sentenced the petitioner to jail for a year, a confinement usually re-

served in this country for the most serious offenses. He did this without giving petitioner a hearing which would have indicated a good faith interest on the part of the trial court in determining the merits of the case—if in fact the judge was simply interested in having petitioner's testimony.

The government urges that petitioner's counsel never suggested that he had anything to present in extenuation or to offer regarding the sentence practices of other courts. Obviously, the government is referring to Chief Justice Warren's remarks in the *Brown* case that issues like this are what warrant a Rule 42(b) as opposed to Rule 42(a) proceeding. However, if the government admits that hearings on issues like this are proper, it should also acknowledge that the defendant need not be confined in his right to a hearing to these particular issues which Chief Justice Warren suggested. The Chief Justice's suggestions were meant as examples and not as limitations upon the issues which could be raised.

The government argues that if compliance with court orders regarding Grand Jury testimony could only be obtained at the expense of a *cumbersome full-dress* trial that the Grand Jury's investigatory power would be impaired. Indeed, this is the same argument which has been made about the full protections of all constitutional guarantees. All are awkward and cumbersome in terms of fast, expeditious convictions. Their values all lie elsewhere. Moreover, in this case only the briefest delay would have been necessary. It is hard to imagine how a delay of a few days to allow a defendant to study the law, converse with his attorney, secure witnesses and generally examine his alternatives would defeat the administration of justice. Indeed, it could be argued that it would add to the dignity of justice to act with such regard for the rights of individuals. Swiftness is not always justice.

The government's arguments throughout its brief indicate that their contentions are matters of hindsight and

ingenuity. The government suggests that this criminal contempt sentence was akin to a civil contempt sentence; it suggests that although Rule 42(b) would have been proper that under the circumstances Rule 42(a) was equally as proper; that the disobedience out of the court's presence may be converted to misbehavior in its presence; it suggests that the defendant really had no issues to raise and that the prosecutor and trial court were really looking out for *his* best interests. These arguments are nothing more than afterthoughts and rationalizations to make seem legitimate what was really an improper and unfair procedure on the part of the trial court in this case—procedures which resulted in petitioner being sentenced to a year in jail.

Rule 42(b) is a product of years of consideration by this Court; it emanates from the opinions of former Justice Harlan in *Ex Parte Terry,* 128 U.S. 289 and Chief Justice Taft in *Cooke* v. *U. S.,* 267 U.S. 517. The Rule should be, in the words of Mr. Justice Clark when he was Attorney General and the Rules were promulgated, followed solemnly "with the full measure of life and spirit which the framers intended to impart." Notes and Proceedings of the Federal Rules of Criminal Procedure (1946).

2. In its brief, the government rationalizes and suggests approval of the sentence in this case on grounds which are unjustifiable, unwise as a matter of policy, and unconstitutional as a matter of law.

The *dictum* and the footnote in the *Barnett* case is no great departure from the trend of American decisions as the government suggests, but is consistent with the historic hesitancy of the Federal courts, and particularly the Supreme Court, in allowing an unrestrained use of the precipitous summary contempt power. Through the years the Supreme Court consistently has commented on the danger of the non-jury trial aspect of the contempt power and suggested caution in the exercise of that summary power. Time and time again, the Federal courts, even

when upholding the summary contempt power, noted the danger and subversive nature of such a power. In the *Sacher* case (343 U.S. 1, 1952), Justice Jackson said that summary punishments must always be regarded with disfavor. In the *Ballantyne* case (237 F.2nd 657, 1956), the fifth circuit court said, "It is abhorent to Anglo-Saxon justice as applied in this country that a man, however, lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has only permitted one exception, a limited right of courts to punish for contempt. But that right has been grudgingly granted, has been held down uniformily to the least possible power adequate to the end proposed." Justice Murphy said in *Fisher* v. *Pace,* 336 U.S. 155 (1948), the contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings, and that its use should be carefully restricted. The first circuit court in the *Farese* case, 209 F.2nd 312 at 315 (1954), said "the grant of summary contempt power . . . is to be grudgingly construed so that the instances where there is no right to a jury trial will be narrowly restricted to the bedrock cases where the concession of drastic power to the courts is necessary to enable them to preserve . . . authority . . . afforded . . . decorum . . ."

Legal commentators have also urged that the summary contempt power is an anomoly in American law and should be restrained. Edward Livingston in his famous work on criminal procedure in 1873 made some classic comments about the dangerous nature of the contempt power. He noted that all rationales for giving courts broad and indefinite contempt powers are based upon necessity, even though the power itself is repugnant to all the fundamental principles of justice applicable to other criminal acts. In response to this claim of necessity, he wrote: "Not one of the oppressive prerogatives of which the crown has been successfully stripped in England but was and is today defended on the plea of necessity. Not one of the attempts

to destroy them but was deemed a hazardous innovation." This same point was emphasized in the Green dissent by Justice Black when he pointed out that necessity as a rationale for the summary contempt power has come to mean expedient rather than indispensable. This loose rationale does not warrant derogation of fundamental constitutional rights.

Livingston's idea about the proper function of contempt is interesting. As a matter of fact, it rather ties in with the 1831 and the present contempt statutes. Livingston said that courts, of course, should have the right of self-defense. But only society as a whole should have the right to punish offenses. A single party should not have the right to punish; only the sovereign should have this power. Thus, though the government body, here the courts, should have a power of self-defense, the power to punish should be exclusively invested in society as a whole and not in its individual departments. He compared contempt cases with the law of assault. Certainly an individual may defend himself, just as a court may summarily deal with interruptions or offenses in its physical presence. But once having defended himself or itself, they cannot go further and punish the assailant other than through the orderly processes of the law. Courts should have the right to dispel interference with the performance of their functions, and the 1831 statute and the present statute gives them that power. But the instant case does not involve such a contempt. Since it does not, there is no need or rationale for a summary punishing action in this case.

At pages 38 and 46 of its brief, the government argues that the draftsmen of the Constitution intended to preserve the power of the courts to punish disobedience summarily and that the colonial statutes bear this out. There is absolutely no proof of this. In fact, Justice Black asked the government for proof of this assertion during the argument in the *Green* case (*Green* v. *U. S.*, 356 U.S. 165

at 207). The government could offer none. It cannot now. See 57 Michigan Law Review 258, at 262 (1958). The government offers no proof of its historical conclusion, but simply makes the bald statement as if it were so. In fact it has been pointed out in one text on this subject that exceptions to the constitutional right to trial by jury were specifically enumerated in Article III of the Constitution and contempt was *not* one of the enumerated exceptions. Also, since contempt is not one of the enumerated powers granted to the courts or Congress either, but is implied, the argument is strengthened that the general right to trial by jury ought to apply to contempts. Goldfarb, *The Contempt Power,* p. 174.

The right to a trial by jury for all crimes except impeachment was put in the early part of the Constitution and reflected the strong feelings at the time of our nation's birth that the right to trial by jury was essential. Indeed, in his study of the jury, Lesser tells us that the deprivation of this particular right was one of the serious grievances which the Americans had against the King. Lesser, The History of the Jury System; Journals of the Continental Congress 1778-79 at 69.

It was pointed out in *U. S.* v. *Ballantyne,* 237 F.2nd 657 at 667 (5 Cir. 1956), that: "The history which gave rise to the constitutional provisions guaranteeing the rights of trial by jury is succinctly summarized in the Declaration of Independence in which complaint was made that the colonies were deprived 'in many cases of the benefits of trial by jury.' The Constitution provides the trial of all crimes . . . shall be by jury . . . but those fresh from experiences with tyranny were not content with this general guarantee and Amendments VI and VII were promptly adopted, the former providing in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." This the court went on to say "indicates a determination to afford the right of

trial by jury to those subjected to prosecution *of any sort* which might result in fine or imprisonment. The selection of the language of the Sixth Amendment is hardly explainable upon any other postulate." (Emphasis added.)

The government rationalizes the denial of traditional constitutional jury trial guarantees on the ground that the courts' use of a summary power will aid certain liberal causes. The government argues in a footnote at pages 72 and 73 of its brief that the jury's classic power to nullify the law where it feels that is proper may have a basic function in our philosophy of the criminal law; but that the same is not true of court orders. "Enforcement cannot be made to hinge in such cases on the popular concensus reflected in a jury verdict" the government alleges. This is the suggestion of a very shocking notion —that the sovereign should have absolute powers, and that those powers which derive from the people need not be sanctioned by the people. It is a whose-ox-is-gored philosophy which in effect allows juries to convict and acquit as they see fit in cases generally, but if the government does not like the fact that they are acquitting in certain cases that those cases can be withdrawn from the general constitutional protections. Petitioner suggests that this kind of power would be the beginning of a long-term loss because it is an autocratic tactic. Courts should be careful not to allow such incursions into civil liberties based on the passions or needs of the moment.

It could be argued that most particularly in contempt cases the jury has a valuable role and a necessary function. It brings the public's attention and interest to a dispute which is ordinarily an official governmental one. It brings public enlightenment of the processes of government through the jury representation which has been characterized by Justice Frankfurter as an "indispensable element to the popular vindication of the criminal law." More importantly the jury may serve as an insulation between

the alleged offender and the offended party who is judge, jury, victim and sentencer. Thus, it would add a conservative deliberative element to an otherwise unlimited power. Moreover, the jury would add an element of legitimacy to a contempt proceeding. The public might look with skepticism upon a judicial process that allows one man to be judge, prosecutor, sentencer and jury. But, as Justice Black has aptly pointed out, there is inclined to be less false martyrdom where a jury convicts. And, a jury trial gives a better record for the purposes of appeal.

As a basis for its contentions, the government reverts to the old-saw euphemism that contempt is "*sui generis.*" But the summary contempt power as it is commonly used today, and as it was used in the instant case, is the extraordinary and unorthodox exercise of criminal law powers to punish crime without the protections constitutionally guaranteed to alleged criminals. And there *is* authority for dealing with contempt as a crime.

Justice Holmes in the *Gompers* case (233 U.S. 604, at 610-1913), said "These contempts are infractions of law visited with the punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic of crime as that word has been understood in English speech. *So truly are they crimes that it seems to be proved that in the early laws they were punished only by the usual procedure.* But, at least in England, it seems that they may be and preferably are tried in that way." (Emphasis added.)

Nonetheless, contempt has been traditionally classified one way for one purpose and another way for another purpose. Even with regard to the Sixth Amendment, contempt has been considered a crime for the purposes of the statute of limitations (*Gompers* v. *Buck Stone & Range Co.*, 221 U.S. 418 (1911); *Gompers* v. *U. S.*, 233 U.S. 604 (1914); *Pendergast* v. *U. S.*, 317 U.S. 412) but not for the purpose of applying the venue guarantee (*Myers* v. *U. S.*, 264 U.S.

95). This *ad hoc* treatment is all too typical and all too troublesome.

Contempt is a crime for purposes of the pardon power. *Ex Parte Grossman*, 276 U.S. 87 (1925). As long ago as 1917, a federal court ruled that a criminal contemnor should be classified as a convict. *Creekmore* v. *U. S.*, 237 Fed. 743 (8th Cir. 1916). And in 1874, the Supreme Court held that contempt of court is a specific criminal offense and the fine therefor is a criminal judgment. *New Orleans* v. *Steamship Company*, 87 U.S. 387 at 392 (1874). Contempt also has been treated as a crime for the purposes of the right to counsel and to compulsory process, *Gompers* v. *Buck Stone & Range Co.* and *Gompers* v. *U. S., supra; Cooke* v. *U. S.*, 267 U.S. 517 (1926); and for the purpose of the requirement for proof of the offense, *Gompers* case, *supra*. The present Federal statutes state that a defendant is entitled to a trial by jury where an act of contempt simultaneously constitutes another crime. Rule 42(b), and 18 U.S.C. 3691. In other words, an act of contempt may also be perjury; it may be bribery; it may be obstruction of justice. For all these cases there will be a trial by jury. Yet we still hang on to the lingering, vestigial and inappropriate rule that contempt itself is still *sui generis* and can be dealt with specially. We are inching closer and closer, through cases and through legislation, to the realization that this fiction is not so. This case gives this Court an opportunity to strike the *coup de grace* to what is nothing but a remaining dangling anachronism.

The trend in the courts and in Congress is away from the old English and early American rule that there is no trial by jury for contempts. See Goldfarb and Kurzman, Civil Rights v. Civil Liberties—the Jury Trial Issue, 12 U.C.L.A. 486 (1965); 18 U.S.C. 3691, 18 U.S.C. 3692; 18 U.S.C. 402; 71 Stat. 637-38; 42 U.S.C. 1971(e), 1995; The Landrum-Griffin Act of 1959; The Civil Rights Act of

1964 (Congressional Record, daily ed., June 9, 1964 at 12611, 12630, 12653). This Court should not follow the government's suggestion to return to days of yore when personal liberty did not enjoy the place of prominence in society which it does today. This Court should seize the opportunity offered by this case to affirm the rule of the *Barnett* case; the message of that case should not be reversed or cancelled.

The government's brief discloses a misconception of the meaning of the Court's *dictum* and footnote in the *Barnett* case and of the basis of Justice Goldberg's dissent in that case.

The majority opinion in *Barnett* held merely that Barnett was not entitled *as a matter of right* to a jury trial. But the majority also recognized there that in view of the gravity of recent sentences being meted out in summary contempt cases, and in view of the opinions of certain members of the Court that, irrespective of the nature of the offense, the nature of the sentence may warrant a jury trial in some contempt cases (a matter not raised in the certification in the *Barnett* case), a defendant is entitled to the benefit of a jury trial if the sentence exceeds that provided for petty offenses. Petitioner interprets this *dictum* as indicating at a minimum that the present Court would not adopt the majority view in the Green case (which prevailed until Barnett) but that if the Court would not grant jury trials as a matter of right the Court *would* grant a jury trial if the sentence exceeded six months (the clear implication of the *Barnett dictum* in the footnote). The majority in *Barnett* included this *dictum* because "in view of the impending contempt hearing, effective administration of justice requires that this dictum be added." The Fifth Circuit dismissed the case on the remand and never reached the issue of the right to jury trial should its sentence have exceeded six months. That issue is now clearly before this Court in the instant case and in several other

federal cases now pending at various stages of appeal. *U. S.* v. *Shillitani*, 345 F.2d 290 (2 Cir. 1965); *U. S.* v. *Castaldi*, 338 F.2d 883 (2 Cir. 1964); *U. S.* v. *Tramunti*, 343 F.2d 548 (2 Cir. 1965); *U. S.* v. *Pappadio*, 346 F.2d 205 (2 Cir. 1965).

At pages 58 and 59 of its brief, the government argues that the *Barnett* rule (that right to jury trial is based on the severity of the sentence and not the seriousness of the offense) is inconsistent with prior decisions. However, the government fails to realize that the *dictum* in the *Barnett* case sets out a test which is not one of definition but rather is one of limitation. The *Barnett dictum* and footnote does not define what contempt is, or what is a petty offense; it merely limits the power of courts to deal with certain offenses by restricting the amount of sentence which can be adjudged without a jury.

In its argument the government cites the *Clawans* case (300 U.S. 617). Yet, the *Clawans* case clearly states that it *is* proper in considering the nature of an offense to look at the allowable punishment for that offense. Indeed, this has been the classic rule. The government also cites the *Shipp* case (195 U.S. 65). But in the *Shipp* case too it was stated that the amount of punishment, as well as the nature of the offense, determines the classification of the offense as petty or not.

The government states at page 24 of its brief that its fundamental position is that the *dictum* in the *Barnett* case rests upon erroneous premises. This remark defines quite clearly the issue before this Court because the petitioner's fundamental position is that the *dictum* in the *Barnett* case is wise, reasonable, correct, clear and rests upon stronger premises than all of the law before *Barnett*. Indeed, at page 26 of its brief, the government suggests that footnote 12 of the *Barnett* case is supported neither by constitutional history nor sound policy. One wonders who is petitioner in this case. In effect, really, the law that this Court has to apply is the law of the

Barnett case. And the government is in effect asking for a reversal of the clear implications of that case. (The petitioner, facing a year in prison, argues merely that this Court should uphold its last ruling on this issue.) The *Barnett* case was a sensible construction of history. The government spends much of its brief attempting to show that the interpretation of history in *Barnett* was not true one hundred percent of the time; but the Court and any student of the contempt power knows that all aspects of the law of contempt are, if anything, uncertain and inconsistent. The government's argument seems to be that whatever uncertainty and inconsistency now exists should accrue to its benefit.

The government complains in its brief at page 27 that as a result of the *Barnett dictum,* a contempt case in which a judge wishes to impose a sentence in excess of six months is a criminal prosecution within the protection of the Sixth Amendment and the third article of the Constitution. It then condemns the idea that for constitutional purposes contempts can be distinguished on the basis of the sentence imposed. But the *Barnett* ruling does not distinguish between contempts. It merely set limits on the sentence in contempt cases requiring that they be in conformity with constitutional guarantees. This is no shockingly new notion. A misdemeanor classically has been defined as a crime where a sentence is up to one year. A felony has been defined as a crime where the sentence is over one year. Though awkward, definitions like this have been the means for defininining offenses historically, and still are. See 18 U.S.C. 1. There is no reason why, with regard to petty offenses or contempts, it should not be the same.

The government also argues at pages 63 and 64 of its brief that the decision whether to impanel a jury under the *Barnett* rule must be made in the dark and that this is impracticable. It "distributes a constituional right according to a blind chance." This is not really so. The

evidence and the nature of the case would be known in advance by the prosecutor. It is usually the prosecutor who initiates contempt proceedings; if it is not, the judge will know and will generally ask the prosecutor to act. In any event, the court will know ahead of time whether this is likely to be an aggravated or petty offense, and it will have a basis reasonably ahead of time upon which to decide whether there will be a need for trial by jury. This is the rule Congress has adopted in the Civil Rights Act of 1957. Moreover, the difficulty of "distributing a constitutional right," as the government calls it, is to be preferred to denying it.

The government argues at page 60 of its brief that the independence of the Federal courts would be undermined if the *Barnett* rule was followed. Is is suggested that this is nothing but a bogy which has constantly been raised about reform of all aspects of the contempt law. The government did not petition for a rehearing in the Barnett case. The Federal court system has not collapsed since that time. One can compare the situation in Congress where that institution has ceased to exercise its inherent summary contempt power and has proceeded under statute with trial by jury ever since the mid-1800's. Its dexterity and effectiveness have not been rendered impotent as a result of a limitation, much greater than the limitation of the *Barnett* decision, upon its contempt power. The District of Columbia Circuit Court of Appeals applied a rigorous interpretation of *Barnett* and it has not been undermined. *Rollerson* v. *U.S.*, 343 F. 2d 269 (D.C. Cir. 1964). Also see *Randazzo* v. *U. S.*, 339 F. 2d 79 (5 Cir. 1964) where, without complaint, the Fifth Circuit followed petitioner's construction of the *Barnett dictum.*

The government argues at page 60 of its brief that the rule in the *Barnett dictum,* and in the Goldberg dissent would have a damaging effect "precisely when the need to vindicate a court's authority and to demonstrate its

independence is greatest." In reply, it could be argued that not to follow this rule would be to deny the precious protections of the Bill of Rights when *they* are most needed. Any disruption or delay caused by the invocation and acknowledgement of the exercise of constitutional rights is demanded by the Constitution. There is no constitutional right which does not cause some difficulty to the government. It could be argued in every constitutional case that to grant someone the right not to incriminate himself, not to have coerced confessions beaten out of him, not to be searched or seized unreasonably, to have counsel, *etcetera*, all occasion difficulties cumbersome to the government in the enforcement of its laws and the investigation of its crimes. The answer is that we pay that price to live in a free society.

The government argues in its brief that the satisfactory and proper remedy for excessive summary contempt sentences by trial courts is resort to the appellate process by which the reviewing courts may reduce sentences. This contention is a weak one. First of all, as a practical matter, it is difficult to get an appellate court to reduce or modify the sentence of a trial court. It has been the classic function of the trial court to determine sentence based on facts and circumstances which it peculiarly has before it. Indeed, it is the proper role in the administration of justice for the district court to sentence. Warren Olney, director of the Administrative Office of the United States Courts recently reported to the United States Judicial Conference that the volume of new judicial business has left the federal courts with a record high number of pending cases, and that in the last year the appellate courts were not able to cope with the "flood" of cases. The government's argument in this respect would lead to the aggravation of this condition. Secondly, it could be asked, what kind of right is it which has to be guaranteed only by the appellate courts. In effect, the government's contention in this respect is a parallel to the situation in *Gideon* v.

Wainwright, 372 U.S. 335 (1963). The rule before *Gideon*, was that the appellate courts would reverse convictions where no right to counsel led to prejudice. This Court held in the *Gideon* case that this was obstructive of both the Federal system and the proper administration of justice. There as here, if a person has a constitutional right he has it and it is not a matter of grace for which he must hopefully resort to the possible monitoring of the appellate courts. *Gideon* ended the *ad hoc* approach in right to counsel cases; *Barnett* did the same regarding the right to trial by jury for non-petty offenses.

The government in its brief states that Justice Goldberg's dissenting opinion in *Barnett* rests upon an erroneous premise. And then the government goes on to rest its case on Blackstone's Commentaries. Petitioner believes that it is clear from recent scholarship that Blackstone was quite wrong with regard to his feelings about summary contempt practices—much more so than, according to the government's argument, was Justice Goldberg. See Frankfurter & Landis, 37 Harvard L.R. 1010 (1924).

The Goldberg dissent is done an injustice by the government's brief. Justice Goldberg stated that his review of original authorities convinced him that the history relied on by past decisions of this Court does not justify the relatively recent practice of imposing serious punishment for criminal contempts without a jury trial. He was not talking about the historical mistake which Justice Black referred to in the *Green* case (and which has been commonly recognized—that is, the mistake about the source of the summary contempt power which arose from the *Almon* case). The mistake referred to by Justice Goldberg had to do with the basis for allowing serious punishments for criminal contempt without a jury trial. Criminal contempts sometimes were tried without a jury in colonial times but generally the penalties then were minor. Courts did then and can now punish trivial offenses summarily

with trivial sentences, including contempts. Although this minor sentence qualification may not have been the *rule* under which lower courts have punished petty offenses in trivial ways, it may well have been a substantial reason for which the Supreme Court upheld summary treatment in these cases. This interpretation would tie in with the approach of this Court recognized both by Justice Clark who said in the majority opinion in *Barnett* that "it does appear true that since 1957, the penalties imposed in cases reaching this Court have increased appreciably, and with the opinion of Justice Goldberg in his *Barnett* dissent where he pointed out the isolated instances of long imprisonments for criminal contempts before 1957 and the more frequent examples of this after 1957. This pragmatic recognition was also reflected in the attitude of Justice Black in the *Green* case where he said "I am confident that if there had been any inkling that the Federal courts established under the Constitution could impose heavy penalties as they do now for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest to put it mildly."

Justice Goldberg also pointed out in his *Barnett* dissent that at the time of the ratification of the Bill of Rights many states had enacted statutes containing specific limitations on the punishments which could be imposed summarily for criminal contempts. These laws were reflective of existing practices and the early decisions. Thus, his syllogism is correct. It goes as follows: At the time of the Constitution, criminal contempts sometimes were tried without a jury but were *generally* punishable by trivial penalties. Petty offenses were also punishable by trivial penalties without a jury trial. Therefore, this history justifies imposition summarily of no more than trivial penalties for criminal contempts. This approach is less the articulation of what the government calls a *wrong rule* than an existential evaluation of the history of

contempt and punishment at those times. In other words, *if in fact criminal contempts in the colonial period were tried without a jury and were given trivial penalties, and if contempts are now punished differently so that they can no longer be deemed petty offenses punishable by trivial penalties, then the right to trial by jury should not be denied on the authority of that history or indeed upon decisions of this Court which relied on that history.*

Power expands to its outer limit. Courts upheld a broad undefined power so long as it was handled in a restrained way. We can see that the power has since grown and has been used in a far different fashion, though it is still rationalized on the same historical basis. But as our experiences change, so also should our rules. The government cannot have it both ways. If the government wants to have a power which is as broad and unrestrained as the colonial contempt power then it should agree to its being used within the same confines. Yet experience has amply shown that this is not now the case. Therefore, it is appropriate for the Supreme Court to fashion a restriction on the lower courts which use this summary power.

Perhaps the disagreement that the government now has with Justice Goldberg's thinking is based on the fact that the government construes the Goldberg dissent as a concept of what the proper rule was. In fact, Justice Goldberg was talking about what the facts were and what present experiences are. The error of the trial court's procedure in the instant case was less an error in the sense of not following the right historic rule about sentencing than a failure to conform with change as indicated by the footnote in the *Barnett* case.

Applying his existential evaluation of the facts of the case, Justice Goldberg would say that where in fact the government treats a man as a criminal, and deals with his act as an ordinary crime, then the constitutional rights that all criminals have should apply. What he was saying then

was only that there were special treatments for contempts because contempts were treated like other petty offenses in colonial times; but they are not treated in this limited sense now. Now, contempts are treated in fact like crimes and therefore there should be no special procedures to cover them. His rule would be, and this comes from his opinion, "... contempts which are punishable as crimes must be tried by a jury." At p. 759 of the Goldberg dissent. Essentially, this is no departure from Justice Black's evaluation in his dissent that "... the idea that persons charged with criminal offenses such as criminal contempt are not charged with 'crimes' is a judicial fiction." At p. 726 of Black dissent.

At page 27 of its brief, the government concedes that there were colonial contempt cases which were tried before a jury but argues that the overwhelming majority of these decisions concerned trivial contempts which were punished with minor fines and that the general rule allowed trial without a jury. The colonists, it is clear from history, were influenced in their contempt practices by the erroneous conclusions of Blackstone. See Fox, Contempt of Court (1927); Frankfurter and Landis, A Study in Separation of Powers, 37 Harvard Law Review 1010 (1924); Nelles & King, Contempt by Publication in the U.S., 28 Columbia Law Review 401, 525 (1928); Donnelly & Goldfarb, Contempt by Publication in the U.S., 24 Modern Law Review 239 (1961). Even so, the colonial courts kept the exercise of their summary contempt powers within reasonable confines so that the issue of sentence was not litigated. Only recently, as this Court has frequently pointed out, has the dimension of sentences provoked judicial questioning of the constitutionality of the modern contempt practice. See opinions of Justices Harlan and Black in the *Green* case, *supra,* of Chief Justice Warren in the *Brown* case *supra,* and of Justices Clark, Goldberg, and Black in *Barnett.* Moreover, the colonists were not the last word in regard to liberties. Even the cases the government cited indicate

that individuals were punished by being put in stocks and by other cruel types of punishments which we would not condone today.

The government argues at page 49 of its brief that its survey indicates that colonial courts not only did not consider themselves bound in serious cases to impose trivial sentences, but, moreover, contempts were punished occasionally with severe penalties. Even if so, one can ask: does this make it right? Is it worthwhile for the government to show how the contempt power was used or abused then to rationalize its more aggravated abuse now?

3. Even if this Court should decide that the sentence in the instant case is constitutionally permissible, this Court may nonetheless decide that petitioner should have been granted a jury trial where he was sentenced to one year's imprisonment. This the Court may do through its supervisory power over the federal courts. In *Offutt* v. *U. S.*, 348 U.S. 11, at 13 (1954), Justice Frankfurter noted "... the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt."

The supervisory power of the Supreme Court over criminal procedures and the rules of evidence in the Federal system was best articulated by this Court in *McNabb* v. *United States*, 318 U.S. 332 (1942). The Court said that it was unnecessary in that case to reach the constitutional issue.

> For, while the power of this Court to undo convictions in state court is limited to the enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of constitutional validity. *Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.*

> Such standards are *not satisfied merely by observance of those minimal historic safeguards for securing trial* by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force. (Emphasis added.)

Continuing, this Court said that when the Supreme Court reviews state action, it must give deference to what the state considers will best further its own security in the administration of criminal justice. However, this policy accommodation, necessarily a part of the Federal system, is irrelevant to the formulation and application of proper standards for the enforcement of Federal criminal law in the Federal courts.

> The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In *the exercise of its supervisory authority over the administration of criminal justice in the Federal courts,* this Court has from the very beginning of its history formulated rules of evidence to be applied in Federal criminal prosecutions. And in formulating such rules of evidence for Federal criminal trials *the Court has been guided by considerations of justice not limited to the strict canons of evidenciary relevance.* (Emphasis added.)

And in mentioning when the Supreme Court should exercise this supervisory power, the Court said, "We are not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement . . . The history of liberty has largely been the history of observance of procedural safeguards." Interestingly, Justice Frankfurter also said that a conviction based on such misconduct "cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." This attitude, something akin to the doctrine of *Shelley* v. *Kraemer,* 334 U.S. 1 (1947), reflects the disposition of the Supreme Court not to sanction federal courts' upholding misconduct on the ground that, if

they do, the courts themselves become a part of the wrong. It could be argued that in the instant case, the court's misconduct goes even further because the court itself is guilty of procedural misconduct.

The Supreme Court has exercised its supervisory power over the Federal court system in a variety of situations: in the *Nardone* case (308 U.S. 338, 1939), where products of illegal wire taps were admitted in evidence; in the *Marshall* case (360 U.S. 310, 1958), where jurors had read about a defendant's prior record and, after being questioned about this by the Court, were allowed to sit; in the *Elkins* case (364 U.S. 206, 1960), where evidence illegally obtained by state officials was used in a Federal trial; and in the *Bruno* case (308 U.S. 287, 1939), where the trial court refused the request of the defendant to instruct the jury about the defendant's failure to testify. In all these cases, the Supreme Court reversed convictions on the basis of its supervisory power over the lower Federal courts and its ability thereunder to determine rules of evidence and procedure to guide the courts.

Referring to the Court's opinion in the *Nardone* case, Justice Frankfurter said in *McNabb*: "The civilized conduct of criminal trials cannot be confined within mechanical rules." While judges must have discretion in matters before them, our system relies on the learning, good sense, fairness, and courage of the Federal trial judges.

It is not necessary for this Court to sustain its *dictum* in *Barnett*, on constitutional grounds. This Court may uphold petitioner's claim for the right to notice and hearing under Rule 42(b), and for a jury trial if his sentence exceeds six months, predicating its decision upon the Supreme Court's clear and classic power to determine proper procedures to guide the lower Federal courts in their administration of criminal justice and to assure that such procedures are consistent with "minimal historic safeguards" and "civilized standards."

CONCLUSION

For the foregoing reasons and those stated in our opening Brief, we respectfully submit that the judgment of the court of appeals should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1965.

Al Harris, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 6, 1965.]

Mr. Justice Douglas delivered the opinion of the Court.

This case brings back to us a question resolved by a closely divided Court in *Brown* v. *United States*, 359 U. S. 41, concerning the respective scope of Rule 42 (a) and of Rule 42 (b) of the Federal Rules of Criminal Procedure. Petitioner was a witness before a grand jury and refused to answer certain questions on the ground of self-incrimination. He and the grand jury were brought before the District Court which directed him to answer the questions propounded before the grand jury, stating that petitioner would receive immunity from prosecution. He refused again to give any answers to the grand jury. He was thereupon brought before the District Court and sworn. The District Court repeated the questions and directed petitioner to answer, but he refused on the ground of privilege. The prosecution at once requested that petitioner be found in contempt of court "under Rule 42 (a)." Counsel for petitioner protested and requested an adjournment and a public hearing where he would be permitted to call witnesses. The District Court denied the motion and thereupon adjudged petitioner guilty of criminal contempt, imposing a sentence of one year's imprisonment.[1] The Court of Appeals affirmed, 334 F. 2d 460. We granted certiorari, 379 U. S. 944.

[1] "The Court: Anything further?

"Mr. Maloney: No, your Honor.

"I think the record speaks for itself, and I would ask your Honor

Rule 42 (a) is entitled "Summary Disposition" and reads as follows:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Rule 42 (a) was reserved "for exceptional circumstances," *Brown* v. *United States*, 359 U. S. 41, 54 (dissenting opinion), such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of "the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power," *ibid.*, and in light of the wording of the Rule. Summary contempt is for "misbehavior" (*Ex parte Terry*, 128 U. S. 289, 314) in the "actual presence of the Court." Then speedy punishment may be necessary in order to achieve "sum-

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to find this witness in contempt of court under Rule 42 (a) of the Federal Rules of Criminal Procedure.

"Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.

"I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

"I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

"I also would request that the contempt hearing be held in public.

"The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42 (a)."

mary vindication of the court's dignity and authority." *Cooke* v. *United States*, 267 U. S. 517, 534. But swiftness was not a prerequisite of justice here. Delay necessary for a hearing would not imperil the grand jury proceedings.

Cases of the kind involved here are foreign to Rule 42 (a). The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify "committed in the actual presence of the court" for the purposes of Rule 42 (a). It served no other purpose, for the witness had been adamant and had made his position known. The appearance before the District Court was not a new and different proceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it. Even though we assume *arguendo* that Rule 42 (a) may at times reach testimonial episodes, nothing in this case indicates that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures (*Cooke* v. *United States, supra,* at 536) was necessary. Summary procedure, to use the words of Chief Justice Taft, was designed to fill "the need for immediate penal vindication of the dignity of the court." *Ibid.* We start from the premise long ago stated in *Anderson* v. *Dunn*, 6 Wheat. 204, 231, that the limits of the power to punish for contempt are "the least possible power adequate to the end proposed." [2] In the instant case, the dignity of the court was not being affronted: no disturbance had to be quelled; no insolent tactics had to be stopped. The contempt here com-

[2] And see *Nye* v. *United States*, 313 U. S. 33, 52–53; *In re Michael*, 326 U. S. 224, 227; *Cammer* v. *United States*, 350 U. S. 399, 404.

mitted was far outside the narrow category envisioned by Rule 42 (a).

Rule 42 (b) provides the normal procedure.[3] It reads:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Such notice and hearing serve important ends. What appears to be a brazen refusal to cooperate with the grand jury may indeed be a case of frightened silence. Refusal to answer may be due to fear—fear of reprisals on the witness or his family. Other extenuating circumstances may be present.[4] We do not suggest that there

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[3] Rule 42 (b) was described by the Advisory Committee as "substantially a restatement of existing law. *Ex parte Terry*, 128 U. S. 289; *Cooke* v. *United States* . . . ." We have confirmed this on more than one occasion, *e. g.*, *Offutt* v. *United States*, 348 U. S. 11, 13–14; *Brown* v. *United States*, *supra*, at 51.

[4] Chief Justice Taft said in *Cooke* v. *United States*, *supra*, at 537: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused

were circumstances of that nature here. We are wholly ignorant of the episode except what the record shows and it reveals only the bare-bones of demand and refusal. If justice is to be done, a sentencing judge should know all the facts. We can imagine situations where the questions are so inconsequential to the grand jury but the fear of reprisal so great that only nominal punishment, if any, is indicated. Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or suspicion but will come to the sentencing stage of the proceeding with insight and understanding.

We are concerned solely with "procedural regularity" which, as Mr. Justice Brandeis said in *Burdeau* v. *McDowell*, 256 U. S. 465, 477 (dissenting), has been "a large factor" in the development of our liberty. Rule 42 (b) prescribes the "procedural regularity" for all contempts in the federal regime [5] except those unusual situations envisioned by Rule 42 (a) where instant action is necessary to protect the judicial institution itself.

We overrule *Brown* v. *United States*, *supra*, and reverse and remand this case for proceedings under Rule 42 (b).

Reversed.

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should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

[5] In more than one instance in the Southern District of New York, from which this case comes, witnesses cited for testimonial contempt before the grand jury were given hearings under Rule 42 (b). *E. g.*, *United States* v. *Castaldi*, 338 F. 2d 833; *United States* v. *Traumunti*, 343 F. 2d 548; *United States* v. *Shillitani*, 345 F. 2d 290; *United States* v. *Pappadio*, 346 F. 2d 5. There is no indication that this procedure impeded the functioning of the grand jury.

UPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1965.

Harris, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 6, 1965.]

Mr. Justice Stewart, with whom Mr. Justice Clark, R. Justice Harlan, and Mr. Justice White join, ssenting.

The issue in this case is the procedure to be followed hen a witness has refused to answer questions before a and jury after he has been ordered to do so by a dis- ict court. This issue, involving Rule 42 (a) and Rule 2 (b) of the Federal Rules of Criminal Procedure, was, the Court says, resolved in *Brown* v. *United States*, 59 U. S. 41.[1] That was six years ago. Since then this ourt has made no changes in Rule 42 (a) or 42 (b).[2] ut today *Brown* is overturned, and the question it esolved" is now answered in the opposite way.

The particular question at issue here is of limited nportance. But in this area the Court's duty is impor- ant, involving as it does the responsibility for clear and onsistent guidance to the federal judiciary in the appli- ation of ground rules of our own making. We are not aithful to that duty, I think, when we overturn a settled onstruction of those rules for no better reasons than hose the Court has offered in this case.[3]

[1] *Brown* v. *United States* was reaffirmed and followed in *Levine* v. *Inited States*, 362 U. S. 610.

[2] The proposed amendments to Rules of Criminal Procedure for he United States District Courts, approved on September 22–23, 965, by the Judicial Conference of the United States make no hanges in Rule 42 (a) or Rule 42 (b).

[3] No argumentation or factual data are contained in the Court's pinion today which were not fully revealed in the dissenting opinion n *Brown*, 359 U. S. 53–63, *passim*, and considered by the Court

The limited scope of the question at issue is made clear by the present record. A grand jury in the Southern District of New York was investigating alleged violations of the Federal Communications Act.[4] The petitioner appeared before this grand jury pursuant to a subpoena. He refused to answer a number of questions about an interstate telephone call upon the ground of possible self-incrimination. The petitioner was then granted immunity from any possible self-incrimination under § 409 (l) of the Communications Act.[5] Only after giving the petitioner and his lawyer a full opportunity to be heard did the District Judge rule that the petitioner was clothed with complete constitutional immunity from self-incrimination, and only then did he direct the petitioner to answer the grand jury's questions. The petitioner returned to the grand jury room and again refused to answer the questions, this time in direct and deliberate disobedience of the District Judge's order.

It is common ground, I suppose, that the petitioner was then and there in contempt of court.[6] Since the petitioner's refusal to obey the judge's order did not occur within the sight and hearing of the judge, a contempt proceeding could then have been initiated only under Rule 42 (b). Such a proceeding would have been

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there. Nor is it suggested that the *Brown* rule has proved to be unclear or difficult of application. The considerations attending the overruling of *Brown* are quite unlike those involved in the overruling that occurred in *Swift & Co., Inc.* v. *Wickham*, — U. S. —, where the Court changed a procedural rule which it found unworkable in actual practice.

[4] 47 U. S. C. §§ 203 (c) and 501, and 18 U. S. C. § 1952.

[5] 47 U. S. C. § 409 (l).

[6] The prevailing opinion today says, "The real contempt, if such there was, was contempt before the grand jury . . . ." But a grand jury is without power itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify, if, after appearing, he refuses to do so.

fully consonant with our decision in *Brown*,[7] and a judge "more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken just such a course." 359 U. S., at 50. In such a proceeding all that would have been required to prove the contempt would have been the testimony of the grand jury stenographer, and the judge could then have imposed sentence. Such a procedure is often followed.[8]

Instead, however, the District Judge in this case followed the alternative procedure approved in *Brown*. He made one last effort to aid the grand jury in its investigation and gave the petitioner a final chance to purge himself of contempt. The petitioner and his lawyer appeared before the judge in open court.[9] After the petitioner was sworn as a witness, the judge propounded the same questions which the petitioner had refused to answer before the grand jury. The petitioner again refused to answer. At the conclusion of the questioning the judge asked, "Does anybody want to say anything further?" The only response from the petitioner's counsel, then or later,[10] was a brief renewal of his attack

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[7] "When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt. At that point a contempt proceeding could unquestionably and quite properly have been initiated. Since this disobedience of the order did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the proceeding would have been conducted upon notice and hearing in conformity with Rule 42 (b). See *Carlson* v. *United States*, 209 F. 2d 209, 216 (C. A. 1st Cir.)." 359 U. S., at 50.

[8] See cases cited in note 5 of the Court's opinion, *supra*, p. ——.

[9] The record shows that the court was "opened by proclamation."

[10] Before imposing sentence, the judge gave petitioner and his counsel still another opportunity to offer any explanation they might have of the petitioner's obduracy:

"*The Court:* I have already made my position perfectly clear, but I will say it again: I have directed you to answer these questions

upon the purpose of the grand jury investigation and the scope of the immunity which had been conferred upon the petitioner—legal questions which the judge had, after a complete hearing, fully determined before he had ordered the petitioner to answer the grand jury's questions in the first place.

The procedure followed by the District Court in this case was in precise conformity with Rule 42 (a) and with long-settled and consistently followed practice.[11] It is a procedure which, in this context, is at least as fair as a Rule 42 (b) proceeding. The petitioner, represented by counsel, was accorded an additional chance to purge himself of contempt; he and his counsel were accorded full opportunity to offer any explanation they might have had in extenuation of the contempt—to inform the "sentencing judge of all the facts." And finally, there is no reason to assume that a sentence imposed for obduracy before a grand jury is likely to be more severe in a Rule 42 (a) proceeding than one imposed after a proceeding

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before the grand jury, and I have directed you to answer them here. It is my ruling that you cannot be prosecuted for any answer that you give under the circumstances of this case. Do you still refuse Mr. Harris?

"*The Witness:* I respectfully refuse to answer on the grounds it would tend to incriminate me.

"*The Court:* Anything further?"

[11] See, in addition to *Brown* v. *United States*, 359 U. S. 41, and *Levine* v. *United States*, 362 U. S. 610: *Rogers* v. *United States*, 340 U. S. 367; *Wilson* v. *United States*, 221 U. S. 361, 369; *Hale* v. *Henkel*, 201 U. S. 43, 46; *United States* v. *Curcio*, 234 F. 2d 470, 473 (C. A. 2d Cir.), rev'd on other grounds, 354 U. S. 118 (1957); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8th Cir.); *United States* v. *Weinberg*, 65 F. 2d 394, 396 (C. A. 2d Cir.). For the earlier practice at common law, see *People ex rel. Phelps* v. *Fancher*, 4 Thompson and Cook (N. Y. 1874) 467; *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74, 79–80 (1861); *In re Belle Harris*, 4 Utah 5, 8–9, 5 P. 129, 130–132 (1884); *Heard* v. *Pierce*, 8 Cush. 338, 342–345 (Mass. 1851).

under Rule 42 (b). Indeed, the recent Rule 42 (b) cases in the Southern District of New York referred to by the Court indicate the contrary.[12] A sentence for contempt is reviewable on appeal in either case,[13] and there is nothing to suggest that in the exercise of this reviewing power an appellate court will have any more information to go on in the one case than in the other.

For these reasons I would affirm the judgment of the Court of Appeals.

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[12] See note 5 of the Court's opinion, *supra*, p. —. *United States* v. *Castaldi*, 338 F. 2d 883 (two years); *United States* v. *Tramunti*, 343 F. 2d 548 (one year); *United States* v. *Shillitani*, 345 F. 2d 290 (two years); *United States* v. *Pappadio*, 346 F. 2d 5 (two years).

[13] See *Green* v. *United States*, 356 U. S. 165, 188; *Yates* v. *United States*, 356 U. S. 363; *Nilva* v. *United States*, 352 U. S. 385, 396; *Brown* v. *United States*, 359 U. S. 41, 52.